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# OHIO CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME III.

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CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

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VINTON R. SHEPARD, EDITOR.

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CINCINNATI:  
THE OHIO LAW REPORTER COMPANY.  
1904.

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*Rec. Dec. 12, 1905*

# JUDGES OF THE CIRCUIT COURTS OF OHIO

FROM FEBRUARY 8, 1901, TO FEBRUARY 8, 1902.

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HON. SILAS M. DOUGLASS, *Chief Justice*, Mansfield, Ohio.  
HON. ULYSSES L. MARVIN, *Secretary*, Akron, Ohio.

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## FIRST CIRCUIT.

*Counties—Butler, Clermont, Clinton, Hamilton and Warren.*

PETER F. SWING.....Cincinnati  
WILLIAM S. GIFFEN.....Hamilton  
FERDINAND JELKE, JR.....Cincinnati

## SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,  
Madison, Miami, Montgomery, Preble and Shelby.*

HARRISON WILSON .....Sidney  
THEODORE SULLIVAN .....Troy  
AUGUSTUS N. SUMMERS.....Springfield

## THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,  
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,  
Union, Van Wert and Wyandot.*

CALEB H. NORRIS.....Marion.  
JAMES H. DAY.....Celina.  
WILLIAM T. MOONEY.....St. Mary's.

## FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,  
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,  
Vinton and Washington.*

HIRAM L. SIBLEY .....Marietta  
THOMAS CHERRINGTON .....Ironton.  
THOMAS A. JONES.....Jackson.

#### FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,  
Licking, Morgan, Morrow, Muskingum, Perry, Richland,  
Stark, Tuscarawas and Wayne.*

SILAS M. DOUGLASS.....Mansfield  
RICHARD M. VOORHEES.....Coshocton.  
MAURICE H. DONAHUE.....New Lexington.

#### SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,  
Williams and Wood.*

GEORGE R. HAYNES.....Toledo.  
ROBERT S. PARKER.....Bowling Green.  
LINN W. HULL.....Sandusky.

#### SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,  
Harrison, Jefferson, Lake, Mahoning, Monroe,  
Noble, Portage and Trumbull.*

JEROME B. BURBOWS.....Painesville.  
PETER A. LAUBIE.....Salem.  
JOHN M. COOK.....Steubenville.

#### EIGHTH CIRCUIT.

*Counties—Cuyahoga, Lorain, Medina and Summit.*

HUGH J. CALDWELL .....Cleveland  
JOHN C. HALE.....Cleveland.  
ULYSSES L. MARVIN.....Akron.



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Kerns v. Linden et al.  
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# OHIO

## CIRCUIT COURT REPORTS.

VOLUME III—NEW SERIES.

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CAUSES ARGUED AND DETERMINED IN THE CIRCUIT  
COURTS OF OHIO.

---

### CONTRACTS OF NOVATION.

[Circuit Court of Cuyahoga County.]

EDWARD JARMUSCH v. OTIS IRON & STEEL CO.\*

Decided, December 16, 1901.

*Novation—Requisites of Contract of—Evidence Establishing That Em-  
ployee Became Party to—Pleading Construed in Harmony With  
Theory Upon Which Trial Proceeded—Obligation Not Within  
Statute of Frauds—General Verdict—All Defenses Need Not Be  
Sustained.*

- 1 A contract of novation becomes binding, when based upon: (1) a previous valid obligation; (2) an agreement by the old parties and the new party to the new contract; (3) that the new contract shall be complete and extinguish the old; and (4) the making of a valid new contract.
2. In a sale by one corporation to another of its entire property and business, one condition being that the new company shall carry

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\* Affirmed by the Supreme Court of Ohio, May 12, 1903.

## 2 CIRCUIT COURT REPORTS—NEW SERIES.

Jarmusch v. Otis Iron & Steel Co.

[Vol. III, N. S.]

- out a contract previously entered into by the old company, the obligation of the new company is a new obligation, founded upon a sufficient consideration, and it is not necessary that it be in writing as required by the statute of frauds.
3. An employe of the old company under a specified contract, who has conversations with the officers of the new company regarding his contract, and in conformity therewith is placed on the pay-roll at stipulated wages, is estopped from complaining that the finding of the jury that he was a party to the novation was warranted and that he is without a claim against the old company.
  4. Where an answer fails from a technical point of view to set up a novation, but the case was tried on that theory, and there was evidence supporting such a theory, it is not reversible error for the court in its charge to the jury to construe the contract as setting up such a defense.
  5. In a case where there were numerous defenses and the verdict was a general one, if there was sufficient evidence to sustain any one of the defenses, the judgment will not be reversed.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Heard on error.

The plaintiff brought his action in the common pleas court to recover damages from the Otis Iron & Steel Company for the violation of a contract that he had with the defendant. The plaintiff was injured while in the employ of the defendant and he settled with the defendant the damages he claimed by reason of such injury by a contract in which he was to have services as a crane-boy at certain wages, and at any time that the defendant thought him capable of doing other work more remunerative, it would give him such work.

In about a year after this contract was made and entered into, the Otis Iron & Steel Company sold out to the Otis Iron & Steel Company, Limited, an English corporation. The plaintiff continued to work for the new company for a number of years when he left its employ, claiming that he left by reason of the fact that the work that he was doing, which was the same work he entered upon after the making of the contract, had become dangerous to him in his crippled condition, by reason of new appliances put in, whereby the cranes were operated by electricity; and then brought this action to recover of the original company.

The original company made an attempt to plead a novation,

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Cuyahoga County.

and undertook to say in its answer that the plaintiff had, under this contract, worked for the defendant, and that there was an agreement to the effect that he should be continued under his contract by the new company.

The plaintiff claims that he did not know there was any change in the company; that he supposed, for all the years that he was working there, that he was still working for the Otis Iron & Steel Company.

The plaintiff failed to recover in the common pleas court, and he prosecutes his petition in error here, and alleges numerous errors, and desires to have the judgment of the court of common pleas reversed by reason of such errors.

Among other things set up in the answer is a denial of the making of the contract on which suit is brought; and it is claimed that the verdict, being a general one in favor of the defendant, that that means that all the defenses of the defendant are sustained; and that the jury were not warranted in so finding, for the reason that there was no evidence tending to show that the defendant did not enter into the contract; but the law in such case, as established in this state, is that where there are numerous defenses and the verdict is a general one, if there is sufficient evidence to sustain any one defense the case should not be reversed, and the ground taken by counsel that the case should be reversed for this reason is not well founded.

The plaintiff claims that he was prejudiced in the charge of the court in that the court stated in substance to the jury that the answer was to the effect that a contract of novation had been entered into between the old and new company and the plaintiff, and it is claimed that the answer is not to that effect, but is only to the effect that the plaintiff entered into a new contract with the new company, and that the old company was not a party to that new contract.

It is true that the answer does claim that there was a novation, and, in stating the facts, does not state that the old company was a party to the contract that would work the novation, and that the court perhaps gave a very liberal construction to the answer; but the case was tried upon the theory that both the old and the new company and the plaintiff were parties to the

new contract, and it seems that on the trial the answer was treated as setting up the defense fully as stated to the jury, while a literal construction of the answer, it might be said, does *not* show that the defendant averred that it was a party to the new contract. However, it being so treated on the trial, and evidence being offered tending to show that the old company was a party to the contract, we do not think it reversible error that the court to the jury construed the answer as it did.

It is claimed as error that the court did not charge upon the statute of frauds. The plaintiff contended that if the new company had agreed to carry out this contract with the plaintiff and at the request of the old company, that it was not a contract that would warrant the plaintiff in bringing suit upon it in case of a breach of the same; that it was a mere promise to pay the debt of another, and not in writing, and hence, under Section 4199, Revised Statutes, was not a valid contract and could not take the place of the old contract in law.

The record is silent in a large measure as to what the consideration was that passed from the old company to the new, that induced it to assume liability under this contract; but the entire evidence, taken as a whole, makes it clear that in the sale that was made by the old company of its property to the new company, one consideration was that the new company should obligate itself to carry out and entirely fulfill the obligations of the old company under the contract; if so there would be no statute of frauds applying to the matter at all, as in such case the obligation of the new company would be a new obligation founded upon a sufficient consideration, and it would not be necessary to have it in writing, nor could there be any defense to the same when sued upon the new contract.

It is contended that the new company had no power to make such a contract; that it was outside of the business that it was created to do. We see nothing to this point. It was entirely legitimate for the new company to agree to carry out the contract of the old company with the plaintiff as a part consideration of the purchase of the property of the old company.

The attorneys in the case are in contention as to what constitutes a novation, and also as to whether or not there was sufficient evidence in the case to establish a novation.



1904.]

Cuyahoga County.

As we understand it, the requisites of a contract of novation are: (1), A previous valid obligation; (2), An agreement of the old parties to the new contract; that is, of the two parties to the old contract and the party to the new contract; (3), That the new contract shall be so complete as to extinguish the old contract; (4), The making of a *valid new* contract.

When this is done a substitution is accomplished, which may be in the debt, the debtor or creditor. When it results in the substitution of a new debtor, the creditor has his cause of action for the violation of the contract against the new debtor only.

It is claimed that these requisites of a contract of novation are not established by the evidence, in this:

First. There is no evidence showing that the old company entered into any such agreement. The evidence on this question is not very voluminous, but there appears in the bill, we think, sufficient to warrant the jury in finding that the old company *did* take part in the agreement and was instrumental, perhaps wholly, in having the new company assume its liability to the plaintiff.

Second. It is claimed that the evidence does not show that the plaintiff was a party to the agreement of novation. There is no evidence showing that the plaintiff entered into negotiations with the two companies by which a contract of novation was made. The evidence consists in showing that he continued to work, and he claims that his continuing to work was, as he supposed all the while, for the old company, and that he was ignorant of any change being made by which one company retired and another was substituted. But the facts are such that we think the jury were warranted in concluding that he *must* have known that he was not working for the company with which he made his first contract. And the evidence further consists of the fact that he went at one time, when he had been laid off or the works were idle, to the officers of the new company and claimed that he had a contract by which they were to give him work, and, after two interviews upon this matter, he was placed upon the pay roll by reason of his contract, at a stipulated rate of wages, whether he worked or not.

The jury were warranted in finding that he was urging with

the new company that he had a contract with it, which could only have been the contract of novation, and that the new company after the officers had made the proper inquiry as to the obligation of it, acquiesced and proceeded to continue to carry out the contract of novation; which was sufficient evidence to warrant the jury in finding the verdict it did.

If the jury were right thus far in its consideration of the case, it would then necessarily follow that the plaintiff would have no cause of action against the old company, for the old contract would be canceled, and his cause of action, if any, would be upon the new contract. So that the result below would be the proper one, whether he had quit work with sufficient excuse or not, and the question of damages as laid down by the court would be a matter of no consideration in determining the correct result of the case in the court of common pleas.

If this verdict was founded upon the charge of the court as to damages and as to whether the plaintiff had any reasonable excuse for quitting his employment, we find no error in the direction of the court upon that question, and we think the jury was warranted in finding that the plaintiff was not justified in quitting his employment under the circumstances.

So that, under whichever proposition these questions are considered, the verdict was justified by the jury, and the judgment of the court of common pleas is affirmed.

*Preusser & Wenneman*, for plaintiff in error.

*Squire, Sanders & Dempsey*, for defendant in error.

1904.]

Lucas County.

## INSURANCE.

[Circuit Court of Lucas County.]

CHARLES A. HERBERT v. STANDARD LIFE &amp; ACCIDENT INS. CO.\*

Decided, October 26, 1901.

*Accident Policy—Taken by a Railway Employee—Premiums Payable on the Installment Plan—Insured Assigns Part of His Wages to Meet Premium—Afterward Collects All the Wages Due Him—And is Injured Before the Insurance Company Would Have Received Its Premium Under the Assignment—When Did the Premium Become Due.*

1. Where a railway employee assigns a part of his wages for a given month to an insurance company, to pay the premium on an accident policy, which premium would become due in the regular course during that month, and the insurance company accepts the assignment, and the wages so assigned by a custom of the railway company are not payable until the 15th of the following month, and the employee leaves the service of the railway company during the month in question and draws all the wages due him, and before the end of the month meets with an accident, he can not maintain a suit on the policy on the theory that the unpaid premium was not payable until the 15th of the following month. [To this holding Judge Parker dissents, his view being that it was the privilege of the insured to have paid the premium with other money than the wages earned in the service of the railway company, and at any time on or before the 15th day of the following month.]
2. An accident insurance company can not avail itself of a provision in an application for insurance that the applicant has no other insurance, when it is in evidence that the insured told the agent of the company with whom he dealt that he had another policy, and the application was made out by the agent in his own handwriting.

HAYNES, J.; PARKER, J., and HULL, J., concur.

This suit was brought upon a policy of insurance issued by the defendant company to Charles A. Herbert, and the case was tried and submitted to a jury in the court of common pleas, and a verdict was rendered for the defendant. Thereupon the plaintiff prosecutes this proceeding in error.

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\* Affirmed by the Supreme Court, March 24, 1903.

The policy is a peculiar one, and was issued on the installment plan. The leading facts of the case are that Herbert was an engineer on a railroad in the state of Minnesota, and on March 28, 1900, he met an agent of that company whom he had met before, at a hotel, and the agent renewed the subject of accident insurance and the issuing of a policy of accident insurance to him, and it was finally agreed that Herbert would take one. Thereupon the plaintiff wrote out the application, which was signed by the assured, and the agent then filled out the policy of insurance and delivered it to the assured on that same day. That policy was to commence on March 28, 1900, at noon. An assignment was made of the wages of the assured upon the railroad company, for four months, being \$14.40 a month, which would pay the amount of the premiums, \$57.60, under the terms of the policy, to which I will refer later.

The plaintiff continued in the employ of the company during the balance of March, the month of April, and until May 17, at which time he drew the money that was due him for the month of May, the money that was due the insurance company for the month of April having been paid to it by the railway company. On May 17 he drew the whole of his money, left the employ of the company, came to Toledo, Ohio, where he remained for some time, and on May 29 he was injured by a fall, breaking his leg. He then brought suit against the insurance company for the amount of certain monthly payments that he claims are due him under the terms of the policy.

The defense is, that under the peculiar terms of the policy and the action of the plaintiff, the policy had terminated on May 28, and was not in force at the time the plaintiff was injured on May 29.

That brings us to the terms of the policy. It is said to be a policy upon the installment plan; that is to say, it has been conceived and gotten up for the purpose of insuring persons who have no present means of paying the premiums, and who make arrangements to have the payment made from their wages. The policy starts out:

“In consideration of the warranties in the application for this policy, and of an order which is to be considered an as-

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signment of moneys therein specified on the paymaster of the C., St. P., M. & O. Ry., hereby insures Charles A. Herbert, of St. James, locomotive engineer by occupation, for the period or periods hereinafter specified, beginning at 12 o'clock noon, standard time, of the day this policy is dated, against bodily injuries sustained, through external, violent, and accidental means, and will pay to him, if surviving, or to Mrs. Anna Herbert, his wife, or, in event of her prior death, to the executors, administrators or assigns of the insured, the indemnity provided in the schedule hereinafter contained, styled, death and indemnity."

In the application for the policy of insurance, after stating many other things, it is stated:

"Accident premium, \$57.60. The premium to be paid by four equal monthly installments as follows: \$14.40 from my wages for the month of April, 1900; \$14.40 from my wages for the month of May, 1900; \$14.40 from my wages for the month of June, 1900; \$14.40 from my wages for the month of July, 1900; which shall apply to the respective insurance periods, and that the policy shall be considered binding only for such insurance period as is covered by an installment of premium actually paid, except as to the time fixed for payment of the first installment."

Here is the peculiarity of the installment plan: "The payments made in the order of assignment are premiums for separate consecutive periods of two, two, three, and five months; and each is to apply only to its corresponding insurance period. All claims for injuries received during any period for which the respective premium shall not have been actually paid shall be forfeited to the company. Except that in case of a just claim before the first premium is due, if the sum due the insured be less than the sum of all the payments called for by the order or assignment, the amount of the claim shall be credited thereon; if greater, the order or assignment shall be receipted in full and the balance paid to the insured. In making settlement for any claim for injuries received during any insurance period for which the premium has been paid, the amount of the premium for later unpaid periods may be deducted from the amount found due."

It is further provided that "in case the insured shall fail to leave in the hands of the paymaster any installment of pre-

mium as it shall fall due, as agreed in said order or assignment, this policy shall be void."

Then there is attached to it the written assignment:

"For value received, I hereby assign to the Standard Life & Accident Insurance Company, of Detroit, Michigan, or its authorized agent, four premiums, for separate insurance contracts, as follows:

"First premium, \$14.40; to be paid and deducted from my wages, for the month of April, 1900.

"Second premium, \$14.40, to be paid and deducted from my wages, for the month of May, 1900.

"Third premium, \$14.40, to be paid and deducted from my wages, for the month of June, 1900.

"Fourth premium, \$14.40, to be paid and deducted from my wages, for the month of July, 1900.

"EXPRESS AGREEMENT.—The payments named in this assignment are premiums for separate and independent contracts for consecutive periods of two, two, three, and five months; and each shall apply only to its corresponding insurance period. All claims for injuries received during any period, for which its respective premium shall not have been actually paid, shall be forfeited to the company. Except that, in case of a just claim, before the first premium shall be due, if the sum due the insured be less than the sum of all the payments called for by this assignment, it shall be credited thereon; if greater, the assignment shall be receipted in full and the balance paid to the insured."

The effect of that policy was to insure him for a year, if the payments were made. The first covered two months, and the next the two months following, and the next three months, and the next five. Under the terms of payment, the policy being issued on March 28, the amount taken out of the earnings of the month of April—\$14.40—paid two months, to-wit, to May 28; then the payments taken out of the May earnings would pay two months more, to-wit, to July 28, and the June payment would pay to October 28, and the July payment would pay for the balance of the year, five months. This is the written contract. As a matter of fact, the railway company in the course of its business only made their payments monthly, on the fifteenth day of the following month; that is to say, the earnings

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for the month of April were paid to the plaintiff on May 15, and so on for each of the succeeding consecutive months.

The first payment of \$14.40 in this case was paid on May 15, and on the seventeenth day he left the employ of the company, and took the whole of his May wages, leaving nothing whatever in the hands of the company, and on May 29 he was injured, and the claim is made now on the part of the assured that his policy was still in force at the time he was injured, and that he has a right to recover. The company, on the contrary, claims that inasmuch as he had drawn his money out of the hands of the railway company, and had left nothing there for the payment of the amount due, under the terms of the policy, the policy had ceased to exist and be in force on May 28.

We have examined the case very fully, but we have not been able to agree entirely upon the rights of the parties, and the opinion that is now delivered will be the opinion of a majority of the court.

It will be observed that nothing whatever is said in the policy or application in regard to any extension of time when the payment of these sums assigned will or may be made. It is only shown by extraneous evidence that as a matter of custom the railroad company did not make its payments until the fifteenth day of the following month for any month's wages, and the testimony shows that this was understood by the insurer, because this was not the only policy it held upon employes of this railroad company similar to the one in controversy. It seems to have been the custom of the insurance company to send a list, prior to the middle of the following month, of the policies that had been issued and the amounts that were due, to the railway company, and the company had been accustomed to leave in the hands of the paymaster money to a sufficient amount to pay the insurance premiums, and, as we understand, pay it to the insurance company. It amounted in one month that is shown here to something like \$460 for that month.

The question here is whether this policy of insurance was in force on May 29. The majority of the court are of the opinion that it was not. In the first place, the assignment of the payments was an absolute assignment: "I hereby assign to the

Standard Life & Accident Insurance Co., of Detroit, Mich., or its authorized agent, four premiums for separate insurance contracts as follows.' It appears incidentally in the evidence that the assignment was recognized by the railway company. It consented to the separating of plaintiff's wages, and paid a part to him and a part to the insurance company; so that at least so far as he was able, he had vested in the insurance company those respective sums. It was provided in the tenth clause—

"In case the insured shall fail to leave in the hands of the paymaster any installment of premium as it shall fall due, as agreed in said order or assignment, this policy shall be void."

Herbert's wages for the month of May would not, in the course of the business, be paid to him until the middle of June, but it was the right of the company to expect, under this assignment, that so much of that amount that was earned during the month of May would be left in the hands of the railway company to meet the amount of this premium of \$14.40. He had assigned it to the insurance company absolutely, on the face of the assignment, and it provided that he should leave this amount with the railway company, or his policy would be void. In this particular month he had earned more than sufficient to pay the \$14.40, for at the time he left he drew out about \$60 in money, that being all that was due him, and left no sum whatever in the hands of the company with which to meet this assignment that was outstanding. His contention is that he had a credit, by the course of their business, to the middle of the next month to make the payment for that period, and if at the time the money became due, on the fifteenth of the month, he should place that amount with the railroad company, or perhaps tender it to the insurance company in some other form, that then his policy would be good, and would be continued. But it is the opinion of the majority of the court that he had no credit to that time, save and except as he left for the insurance company the amount of money that was earned during the month, to cover the premium for the two months after March 28. Had he left that amount of his earnings in the hands of the railway company, for that month, the majority of



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the court have no doubt that then the insurance would have continued; that is to say, by the course of dealing of the insurance company, when the money was left with the railroad company, the insurance company was willing to wait until the middle of the month to receive it. But they had expressly agreed that unless the money was left there, the policy would be void. The plaintiff chose not to leave it, thus violating his assignment and his agreement, and his policy became void. The money being earned, it was a payment in advance. And that was anticipated by the insurance company, because there is a special agreement in regard to this month, that is to say, the month of April, the wages for which were unearned at the time the policy was issued, and he was permitted to have his insurance, although the payment was not to be made until later on.

The question is made as to whether a certain statement was made by the assured in regard to having other insurance, which would avoid his policy, there being no provision in the application that he had no other insurance. The testimony of the plaintiff that he told the agent at the time of filling the application (which was done by the agent himself, in his own handwriting) that he had another policy of \$1,000 in a casualty insurance company in Detroit, and the agent went on and drew the application, had him sign it, wrote the policy and delivered it to him, with full knowledge of that fact, we think under the policy of the law and the decisions, that that should not avoid the policy.

Other questions were made in the case, but inasmuch as the majority of the court are of the opinion that the policy of insurance was not in force at the time the accident occurred, it is unnecessary to discuss those.

The judgment of the court of common pleas will be affirmed.

*Marshall & Fraser*, for plaintiff in error.

*Smith & Baker*, for defendant in error.

PARKER, J., dissenting.

I find myself unable to concur in the conclusions of my associates in this case, and I will undertake to state the grounds of my dissent.

This insurance, like all other insurance of which I have ever had any knowledge, appears to me to have been written in consideration of certain premiums to be paid at certain times, and not in consideration of money to be earned in a certain way or at certain times, or to be kept on deposit in a certain place. It seems to me, therefore, that the crucial question, the whole question here is: Did the insured fail to pay his premiums or any installment of the premiums at the time agreed upon, whereby the policy lapsed or lost its force?

It will be observed, as already stated, that this policy, and this application and the so-called assignment, provide that the payments are premiums for separate and independent consecutive periods of two, two, three and five months, and further, that each installment shall apply only to its corresponding insurance period. The sum of these periods is one year, and the sum of these installments of premium is \$57.60.

The first period of two months began on March 28, and expired May 28. The premium for this period, \$14.40, was paid on May 14 from the April wages of the insured. It appears that that was the time agreed upon as the time for the payment of this premium, though another time is expressly stated in the contract. I arrive at this from the circumstances surrounding the transaction. There is no controversy about that; the insured was to receive his April wages from the company on May 14, and he could not receive them before, and the insurance company could not receive those wages before that time upon this so-called assignment. So that the insurance company had agreed to give to the insured a credit of seventeen days for the payment of this first installment of premium. I shall undertake to point out that there was no special arrangement about this particular payment, but that all these payments stand upon precisely the same footing.

The second period began on May 28 and expired on July 28. The premium for that period was \$14.40, to be paid from his

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May wages, which would become due and payable on June 14; and therefore he was to have a credit of seventeen days for that premium. In other words, his policy was to be in force for a period of seventeen days of that second period without previous payment of anything on account thereof.

The third period began July 28 and expired October 28. The premium for that period was \$14.40, to be paid from his June wages, that is, on July 14th. So that on account of this period the company extended him no credit, but required him to pay this installment of premium fourteen days in advance of the beginning thereof. The fourth period began on October 28, 1900, and expired on March 28, 1901. The premium for that period was \$14.40, to be paid from his July wages, that is, upon August 14, when his July wages would become due and payable, and would be available to him or to the company. So that the company did not agree to extend to him any credit or time for the payment of the premium on account of that period, but on the other hand they required him to pay for that period seventy-two days in advance of the beginning thereof.

In order to keep the policy alive as to the third and fourth periods, the payments on account thereof must be made in the one case fourteen days before it began, and in the other case seventy-two days before it began. And that seems to me to be important in view of certain provisions in the policy, the assignment and the application upon the construction whereof we differ. The so-called assignment after providing that the assured assigns to the Standard Life & Accident Insurance Company or its authorized agent, four premiums for separate insurance contracts, and stating the amounts and the wages from which these installments are to be deducted, this occurs:

“EXPRESS AGREEMENT.—The payments made in this assignment are premiums for separate and independent contracts for consecutive periods of two, two, three and five months; and each shall apply only to its corresponding insurance period.”

Then comes this sentence:

“All claims for injuries received during any period, for which its respective premium shall not have been actually paid, shall be forfeited to the company.”

That is followed by this:

“Except that, in case of a just claim, before the first premium shall be due, if the sum due the insured be less than the sum of all the payments called for by this assignment, it shall be credited thereon; if greater, the assignment shall be receipted in full and the balance paid to the insured.”

I have divided this clause to make my meaning more clear. The construction that is put upon this entire clause beginning with the words “express agreement,” by counsel for the insurance company and by my associates, is this: That all claims for injuries received during any period except the first period, for which its respective premium shall not have been actually paid, shall be forfeited to the company; but as to the first period, if there shall be a just claim before the premium therefor falls due, the sum due the assured shall be paid to him. I do not put that construction upon this paragraph. It seems to me that the exception set forth here has no application whatever to the sentence and provision reading as follows: “All claims for injuries received during any period, for which its respective premium shall not have been actually paid, shall be forfeited to the company,” but that the exception applies to the sentence immediately preceding that, and that this sentence which I have just read stands alone and independent of the others, and is general in its terms, applying to any injury and to any premium. I will read the clause, omitting that sentence, so that the application may be seen:

“The payments named in this assignment are premiums for separate and independent contracts for consecutive periods of two, two, three and five months; and each shall apply only to its corresponding insurance period. Except that, in case of a just claim, before the first premium shall be due, if the sum due the insured be less than the sum of all the payments called for by this assignment, it shall be credited thereon; if greater, the assignment shall be receipted in full and the balance paid to the insured.”

In other words, if a loss occurs before May 14, the premium for the whole year, that is, \$57.60, may be set off by the company against the amount of such loss; if a loss shall occur after

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May 14, no more shall be set off by the company than the premium for the period within which the loss occurred. And this stipulation for the set-off for periods subsequent to the first period could apply to the second period only, and *shows that it was contemplated that a loss might occur before the premium for the second period had been paid*. I say it could apply to the second period only, since with respect to the third and fourth periods it is expressly provided that, in the one case the premium shall be paid fourteen days before the period begins, and in the other case seventy-two days before the period begins. This exception, therefore, as to the first period, in favor of the company, is to the effect that in consideration of their giving this credit of a month and seventeen days, at the expiration of which time the first premium is to be paid, it is provided that in the event of an injury to the insured, or anything happening upon which he would have a claim against the company, as against such claim occurring during that period, the company shall have a right to set off the whole premium of \$57.60; or, in other words, the premium for the whole year. So that the provision that "All claims for injuries received during any period, for which its respective premium shall not have been actually paid, shall be forfeited to the company," stands there, in my opinion, entirely unaffected by the provisions of this exception, which do not seem to have any pertinency, or any possible application, to that provision. This so-called exception is a provision simply as to the amount of set-off that the company shall have as against claims for losses occurring during the different periods.

It has no influence upon the question as to when the premium is to fall due and be payable. I find in these different instruments which make up the contract between the insured and the company, no provision that a failure to *earn* the premium *at a certain time*, or *in a certain way*, or to *keep it on deposit in a certain place*, shall nullify the policy or shall work its forfeiture, or shall cause it to lapse; or that the doing of any of these things is required as a condition precedent to the taking effect of the policy for any period. There is no especial or peculiar value or virtue in the money earned by the insured as wages in work-

ing for the railroad company. Any other money is precisely as good to the insurance company. It seems to me that they so regarded it; that all they required was that the premiums should be paid when they fell due.

As I have said, it seems to me that a fair construction of the contract, in the light of all the circumstances, is, that the premiums were to fall due at the respective periods or times when the wages for the months of April, May, June and July were to fall due, and that therefore this provision in the assignment that all claims for injuries received during any period for which these respective premiums shall not be actually paid shall be forfeited to the company, must be considered in the light of all the surroundings and the evident intent of the parties; and read in the light of these things, it seems to me that it must be read as follows: That all claims for injuries received during any period for which the premium shall not be actually paid *after it becomes due and payable*, shall be forfeited to the company, otherwise this agreement would be a delusion and a snare to the insured. He promised to pay for and supposed he was to be insured during the month and seventeen days intervening between March 28 and May 14, when the first payment is to be made to the company. But he is to pay nothing actually, before May 14. And it seems to me that it would not lie in the mouth of the company to say that the construction to be put upon this provision is that if he suffered a loss during that period—an injury on account of which he supposed he would have a claim against the company—he could not recover, because the premium for the period had not been actually paid.

The same should be true as to the second period after he paid the premium for the first period upon May 14. That payment would carry the insurance up to May 28. The next installment of premium would be payable upon June 14. The time intervening between May 28 and June 14 would be seventeen days. The insured was injured during those seventeen days, to-wit, upon May 29. And thereupon he is confronted with the proposition that since the premium had not been actually paid for the period beginning upon May 28 and expiring upon June 14, he can recover nothing. In my judgment, the policy was in

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full force. Credit for those seventeen days had been extended to him; and if upon June 14 he met the requirements—that is to say, paid any premium then due to the company—he would have a right to recover upon his policy.

But stress is laid upon the tenth clause in the certificate which reads as follows:

“In case the insured shall fail to leave in the hands of the paymaster any installment of premium as it shall fall due, as agreed in said order or assignment, this policy shall be void.”

It seems to me that in the light of all the surrounding circumstances that is to be read in connection with the clause in the assignment to which I have referred requiring actual payment, is as follows: “In case the insured shall fail to leave in the hands of the paymaster any installment as it shall fall due, at the time it shall become due and payable to the company, so that the company may avail itself of it; or if he shall fail to pay that amount to the company at the time it shall become due and payable, then this policy shall be void.” That he was not required to pay his premiums from this particular source, and was not required to earn the money in this particular way, or leave it on deposit in this manner, in order to keep the policy alive, is, I believe, entirely clear, and is conceded by counsel for the company. Apparently it was so understood, for a notice upon the back of the envelope which was delivered to him, in which his certificate was contained, and which formed a part of the agreement between the parties, reads as follows:

“Notice to Policy Holders:—If your policy is to be paid in installments by orders on a paymaster, it is your duty to make sure that each installment is deducted by the paymaster when due, and to notify him if it is not, that he may make the deductions at once. Should you leave the service of the company in which you were employed when insured, you should, for your own protection, *send the unpaid installments to the office as soon as they become due.*”

That is all the insured was required to do to keep his policy alive; he was not required absolutely to earn the money at the hands of the railroad company, nor was he required absolutely to leave it on deposit; he was given the option to do that, or

failing to do that, to pay the premium to the insurance company *when it fell due*.

As I say, it seems to me that the sole question here is: When did this premium for this particular period beginning upon May 28 fall due? Did the insured make default in the payment of that premium? There is no provision, as I construe this contract, that if he shall pay this premium from his wages in the way arranged by this assignment and not otherwise, he shall have until June 14 in which to pay it; that in that event it shall be due and payable upon June 14; but if he does not pay it in this way from this fund, then it shall fall due earlier, that it shall fall due upon May 28. As I understand it, that is the ground upon which a majority of the court arrive at their conclusion that the insured was in default; that is to say, if he had left this particular money on deposit, so that the insurance company might draw it on the 14th day of June, then he would have until June 14 in which to pay it, but failing to do that, he must pay it at the beginning of that period, *i. e.*, on May 28. I find in these writings which make up the contract no provision that any part of the premium shall in any instance be paid at the beginning of the period, or that it shall then fall due. Let us apply that construction and that course of reasoning to the third and fourth installments. What then would be the effect? The third installment is payable from the June wages, and on July 14, when the June wages would be payable. It seems to me, as the result of that reasoning, if he failed to leave his June wages on deposit so that they might be drawn by the company on July 14, his obligation would be to pay the \$14.40 on account of the third period at the beginning of the third period, which would be on July 28, fourteen days later. In other words, by withdrawing the money from the hands of the railroad company, he has the time extended for fourteen days in which to pay the premium for the third period and keep the policy alive. Apply it to the fourth period: He withdraws his July wages; the railroad company is without funds to pay for that period upon August 14, and the effect is that it gives him until the beginning at that period, to-wit, October 28, in which to pay the premium for that period and keep the policy alive, post-



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poning the payment to the insurance company forty-four days. I do not think that the insured has any such right. I think that the agreement is plain that he is to pay for each of the periods at the time fixed for the payment of his wages for the months so to be devoted to the payments for the periods respectively; in other words, the assignment, besides being an assignment, is an agreement that the premiums for the respective periods shall be due and payable at the times that his wages for the respective months become due and payable, and that whether the insured pays the premiums from these wages or from some other source is all the same to the insurance company.

Counsel insist that there is some security to the insurance company through this assignment of wages, but it is quite apparent from the whole record that there is not. The assignment is not recognized by the railroad company unless acquiesced in by the employee at the period when the wages become due and payable. The wages are then on hand, and the insured may or may not permit them to be drawn by the insurance company. They are entirely under the control of the insured during the whole period, as much so as if he had the money in his own pocket. It is simply a convenient arrangement whereby the insured may obtain a certain credit for part of the time, and the insurance company may have its pay far in advance of the insurance period for part of the time, and the insured is not to be troubled with hunting up the insurance company to pay his premium, and the insurance company is not to be troubled hunting up the insured to collect. It is a convenient arrangement for the transfer of this money that shall be due and on hand at the time it shall become due from the railroad to the insured and from him to the insurance company. But if he has other money which he pays to the insurance company it is certainly as valuable to them, and ought to be as effective for the preservation of the life of his policy. They might as well, so far as the assignment, as a matter of security, have provided that the money which he derived from some certain occupation for a certain period he should keep in his left hand trousers pocket until it became due and payable to the company, and if he kept it in his left hand trousers pocket during that period his policy should be kept

alive, but if he failed to do it the policy would lapse. The important thing is, that when the money becomes due and payable to the company it shall be paid to the company.

Long before June 14 the insured had received his injury, and his claim against the company, it is conceded, if the policy were alive, amounted to more than the premium then due. Therefore he was not then called upon to pay anything to the company. The company did not undertake to defeat his claim upon the ground that the premium had become due on May 28, and that he had failed to pay it; the company do not assert the claim that the premium became due at an earlier period in consequence of his having failed to leave his wages with the railroad company, but they assert here the claim that because he did not leave this money in the hands of the railroad company until June 14, which was the time to draw it, his policy had lapsed, notwithstanding the fact that they had no right to draw it, and had no claim upon it, or any part of it for any of this period between May 28 and June 14, even if he had left it there, because he had suffered this injury and had a claim against the insurance company which amounted to more than the premium for this period. I do not believe that is a just, or fair or reasonable conclusion, and therefore I dissent.

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**WAIVER OF JURY TRIAL IN POLICE COURT.**

[Circuit Court of Lucas County.]

**GEORGIE EVANS v. STATE OF OHIO.\***

Decided, October 19, 1901.

*Police Court—Loses Jurisdiction After Term During Which Judgment Was Rendered—Weight of Evidence Before—Jury Trial and Waiver of, in an Assault and Battery Case—Waiver Should be Noted Upon the Record.*

1. A police court has no jurisdiction to hear or determine a motion for a new trial, which is not filed during the term in which the judgment was rendered.
2. Where the evidence is conflicting the judgment of a police court judge, unless manifestly against the weight of the evidence, will not be disturbed by a reviewing court.
3. A waiver of trial by jury in an assault and battery case should, as a matter of safety, be noted upon the record.
4. But where the bill of exceptions is silent as to a demand for a jury, or a refusal to waive the right of trial by jury, in an assault and battery case tried in a police court, a reviewing court in view of the fact that a police court is a court of record and has jurisdiction to try such a case will assume that a jury was waived.

HAYNES, J.; PARKER, J., and HULL, J., concur.

There are two petitions in error filed in this court, one in cause 2504 and the other in 1532. Upon the filing of the first petition in error a suspension of the execution of sentence was had in the case. As appears by the second record, the defendant appeared in the police court and filed a motion for a new trial on the ground of newly discovered evidence, and submitted a number of affidavits to the court in support of that motion. The court overruled that motion, as the record shows, and that action of the police court was affirmed by the court of common pleas. It is not stated in the journal entries the grounds upon which the police court overruled the motion or upon which the court of common pleas affirmed the action of the lower court, though it said in argument that in both cases it was done because the motion was not filed in time.

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\*Affirmed by the Supreme Court without report, April 27, 1903.

The police court is divided into monthly terms, or twelve terms a year (Section 1793, Revised Statutes). This case was tried in January last, and final judgment was rendered on the filed in June, a suspension of judgment being had on June 17, 1901. It will be observed, therefore, that about six months had elapsed between the time of final judgment in the police court and the filing of the motion for a new trial. The statute, Section 5307, Revised Statutes, governing the course of procedure in the police court, provides that all motions must be filed during the term, and, except upon the ground of newly discovered evidence, within three days after the trial. The point is made by the attorney for the state that this motion was not filed in time, and the court had no jurisdiction to hear and determine or to allow it. We hold the position taken is correct, and therefore affirm the action of the court of common pleas in sustaining the police court in that regard, and decline to enter into an examination of the affidavits that were filed.

In the first case it appears that an affidavit was filed in the police court charging the defendant, Georgie Evans, with assault and battery, the prosecution being in the name of the State of Ohio, under the statutes of the state, and the person filing the affidavit being one Gypsy Lonsdale. Thereupon the defendant was arrested, an information was filed in the police court by the prosecutor, and the record discloses this course of proceeding:

“Affidavit filed January 24. Information filed January 25. Defendant in court ready for trial. Plead not guilty. Trial had. Defendant found guilty. Defendant excepts. Continued to January 29 to file motion for a new trial. January 29, defendant in court. Motion for a new trial filed January 28; same submitted this 29th day of January, and motion overruled. Defendant excepts. Defendant is sentenced to sixty days in the workhouse and pay the costs, taxed at \$6.35, stand committed to the workhouse until paid. Defendant excepts.”

Thereupon the defendant was given thirty days in which to prepare a bill of exceptions, which was presented, signed, and filed in the court. The motion for a new trial was as follows:

“Now comes the defendant, Georgie Evans, and moves the court to set aside the verdict heretofore rendered herein, and

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for a new trial, for the reason that the verdict is not sustained by sufficient evidence, and is contrary to law."

The bill of exceptions sets out very briefly in narrative form the evidence said to have been taken before the police court. We have examined this evidence very carefully, and have listened to the arguments of counsel upon that question. The testimony shows in brief and in general, that the defendant was residing on Lafayette street, and the complaining witness was a resident of her house. About midnight of the day in question the complaining witness was dressing to go down to the parlor, and while doing so the defendant asked her to do an indecent act. What that act was is not set forth, presumably it was of such a nature that in the opinion of the court it ought not to be carried into the record. This she refused to do, and upon that some words followed, and the complaining witness started to leave the house. The defendant, claiming that she was indebted to her, proceeded to seize her clothing, and when she did so, the complaining witness, proceeding to protect herself, seized the clothing herself, and upon that an affray ensued. There seemed to have been a considerable noise and talking. There were two other females residing in the house, who seemed to be up and about the house, and they came into the room and joined in, and the result was that the complaining witness left the house minus the clothing that she did not have on her person, as we understand. During the affray she was struck in the eye and was bruised in several parts of the body, as she claimed.

The question before the court was whether or not the defendant had struck her or committed the assault upon her. The defendant claimed that she did not do it, but that one of the other girls did it, and I think one of the other girls testified that she did strike her. However, upon an examination of the evidence, hearing the witnesses, at the conclusion of the testimony the court found her guilty, and sentenced her as appears by the record.

It is said here that it does not appear that this was a house of ill-fame. It may be remarked, however, that it does not appear by the record that it was a house of good fame. But

whatever it may have been in that respect, the witnesses were before the court. The judge of the police court saw them. It may be remarked that in the administration of justice in that court they are very frequently called upon to deal with these various characters whose reputations may be said to be—not good. The judge had the opportunity to see these parties, and to decide the case from their appearance in court, and from their manner of testifying. In everything of that kind we think he would be better able to judge whether the witnesses were telling the truth, or who was telling the truth, than we would be by simply reading this limited record, and we think we ought not to disturb his conclusions and finding of fact.

We are of the opinion that his conclusions were right. This defendant, Georgie Evans, is the one who commenced the attack. She proceeded without any right whatever to levy upon the property of this complaining witness, and the complaining witness endeavored to retain possession of it. It is admitted by all that the complaining witness was injured. She came into court having all the appearances of having suffered from the effects of this attack; it appearing that she had been injured, that much going to sustain her position that she had been injured in an affray, an assault and battery. It would seem that the defendant did not go into that room with any very peaceful intentions, or with any very pleasant feelings towards the complaining witness. It is true that the defendant denies that there was any request that she should do an indecent act. It was said by the other witnesses that the defendant states the truth in that respect. We shall not disturb the verdict on

Upon the hearing in this court a question was raised that is of more importance. It is said it was not raised in the courts below. Whether it was or not does not appear from the record. It has been very fully argued, and realizing the importance of it we asked counsel for full briefs upon the subject.

It will be noted that this offense is now and has been, perhaps, ever since the passage of the criminal statutes of the state, an offense punishable by imprisonment, the statute, Section 6823, Revised Statutes, being that the convicted person may be fined \$200 or imprisoned in the county jail for a period not exceeding

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six months. It was an offense at common law punishable by fine and imprisonment. It appears by the record, as I have already read, that the defendant pleaded not guilty, and that a trial was had, and that the defendant was found guilty; but beyond that the record is silent.

We have spent a great deal of time upon this question, and have examined all the statutes that seem to have any bearing on the point raised or upon the decisions that were cited by counsel. I shall not attempt to go through all of them, but confine myself briefly to so much as we think is necessary to decide the question before us.

Section 1788, Revised Statutes, provides that—

“The police court shall have jurisdiction of any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city or within four miles thereof, to hear and finally determine the same, and impose the prescribed penalty; and in cities of the first grade of the second class the court shall have jurisdiction of any offense under any ordinance of the city and misdemeanor committed within the limits of the county in which such city is situated, to hear and finally determine the same and impose the prescribed penalty; but cases in which the accused is entitled to a trial by jury, shall be so tried, *unless a jury be waived.*”

The Constitution provides that in the trial of crimes and misdemeanors the accused shall have the right to be tried by a jury and meet his witnesses face to face. That provision of the Constitution is applicable to cases of this kind. The statute, I may say in passing, makes a slight difference between the powers of the police court and a magistrate. Magistrates have the right to examine and bind over parties to the court. In cases of felony the police court has the same power; but, so far as I can find, the only power the magistrate has is to bind the party over, except in cases where the party waives a trial by jury in minor offenses and submits to be tried by the court. In the constitution of the police court, however, where the defendant pleads not guilty, if the accused does not waive a trial by jury, the court has the right to summon a jury and proceed to try the case to the jury. The only power the magistrate has where the

accused party has the right of trial by jury and does not waive a jury, is to bind the party over to a higher court.

The question is whether or not this record should not have shown that, before the court proceeded to the trial of the case, the accused waived a trial by jury. Most certainly, in the proper course of the proceedings, it should be put in the record. The clerk in this particular case has omitted it or overlooked it.

I had thought upon the opening of the examination of the case, that it being a jurisdictional question, it would be the duty of the police court, unless trial by jury was waived, to bind the accused over to a higher court; but that court had the right to call a jury to try the case and render final judgment, where a jury was not waived. The statute I have read shows that the police court had full jurisdiction of the case; the Supreme court has held that that court is a court of record. So we have a case where the court had jurisdiction of the crime and of the person, and a court that is a court of record; and, therefore, the general rule may be invoked, that in a court of record where jurisdiction is shown, it will be presumed that all the necessary proof was made or things done in order to enable the court to arrive at the judgment at which it did arrive, unless the contrary is shown; that is to say, it may be said that that principle should be invoked in favor of the waiver of a jury. The courts will presume that a jury was waived unless by a proper bill of exceptions it is shown that the party demanded his right to a trial by jury, or unless it is shown that he refused to waive his right, which amounts to the same thing.

I thought at first that the rules in regard to civil cases would have a bearing upon this question, but I find upon an examination of the decisions of the Supreme Court and the statutes this state of facts:

Section 5130, Revised Statutes, provides:

“Issues of law must be tried by the court, unless referred as hereinafter provided; and issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, *unless a jury trial be waived*, or a reference be ordered as hereinafter provided.”



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Section 5204, Revised Statutes, provides that:

"In actions arising on contract the trial by jury may be waived by the parties, and in other actions with the assent of the court, in the following manner:

"1. By the consent of the party appearing, when the other party fails to appear at the trial, by himself or attorney.

"2. By written consent, in person, or by attorney, filed with the clerk.

"3. By oral consent in open court, *entered on the journal*."

The case of *Bonewitz v. Bonewitz*, 50 Ohio St., 373, went to the Supreme Court upon a journal entry reading as follows:

"That the cause coming on for trial came thereupon the parties and their attorneys, and neither party demanded or waived the interposition of a jury, but without objection submitted the cause to the court upon the pleadings, evidence and argument of counsel."

It was an action upon a written obligation. The judge delivering the opinion of the court says:

"To sustain the judgment of the common pleas, it must appear, either that a jury was waived, or that the issues were such that the cause could of right be tried by the court without a jury."

He then cites the statutes which I have read, Sections 5130 and 5204, Revised Statutes, and held that inasmuch as it appeared that the parties appeared in court and *submitted* the case without a jury, that was in substance an entry upon the journal of the waiver of a jury, because if the party submitted the case to the court, he consented that the court should try it. In many other states the statutes provide that the court may try the case if a jury is not demanded, making it obligatory upon the party, if he desires a jury, to demand it; in others, as appears in the case, *Bonewitz v. Bonewitz*, *supra*, the court may hear the case only upon consent being entered in writing.

After a very full consultation upon the question, and examination of it, whatever our views of it may have been in the first instance, we think the case is decided by the Supreme Court in *Billigheimer v. State*, 32 Ohio St., 435. In that case Billigheimer had been prosecuted under a statute of the state in the name of the state for performing common labor upon the

Sabbath. His defense was that he was an Israelite, and that the Sabbath to him was on Saturday, and he had a right to work on Sunday. According to the provision of the statute at that time the penalty was the imposition of a fine not to exceed \$5. The statute, however, has been changed, and it is now a matter of imprisonment. The statute, however, with regard to the police court of the city of Cincinnati was the same then as it is now, and the accused was required to be tried by a jury unless he waived the jury. In that case the record was silent as to whether the accused waived a jury and showed that the party refused to plead, and thereupon the court entered a plea of not guilty for him, and proceeded to hear the case and to the imposition of a fine. The question was raised whether or not the party could waive a jury at all. It was claimed that under the provisions of the Constitution he must be tried by a jury, and the decision, which is quite a lengthy one, enters very fully into a discussion of that question, holding, after a citation of many authorities, that in cases of misdemeanors a jury might be waived. It is well known that in cases of felony the Supreme Court of this state have held that the accused can not waive a jury; that he must be tried by a jury. The Supreme Court say at page 441 in this case:

“We think, therefore, that as to minor offenses there can be no doubt but that defendant can waive a jury and submit to a trial by the court. The police judge has the power to hear the cause if a jury has been waived. \* \* \* The only question, therefore, is, did the defendant waive his right. As has been said the record indicates nothing on the subject. It merely shows that when the court ordered the plea of not guilty filed, the cause proceeded and evidence was heard. It does not show that defendant demanded a jury, nor that he excepted to proceeding without one. This failure to avail himself of his rights must be held to be a giving of consent.”

It has been said that that was a minor offense, but that makes no difference in this particular case, because the court had no right to try this party, under the statute, unless he waived a jury. But the decision is a decision upon the point that if the record does not show that he demanded a jury, it must be held

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to be a waiver of that right; and that I take to be true, whether it be a statutory right or a constitutional right.

There is an early case, decided in 1854, which went up from this county, *Dailey v. State*, 4 Ohio St., 57, in which there was a prosecution that went up from this county, being a prosecution before the probate judge; and the question there discussed was as to whether the accused might waive a jury trial. The decision was by Judge Kennon, a very able and very conservative lawyer:

"Is the statute, authorizing the probate judge to try the issue upon a plea of not guilty, constitutional? By Section 5 of the Bill of Rights, in our present Constitution, it is provided that the right of trial by jury shall be inviolate. By Section 10 it is provided that in any trial, in any court, the party accused shall be allowed to have a speedy public trial by an impartial jury.

"The probate act confers certain criminal jurisdiction on the probate court, and then provides that, upon a plea other than a plea of guilty, if the defendant does not demand a trial by jury, the probate judge shall proceed to try the issue."

Then he goes quite fully into the question, and holds that the accused was not deprived of the right of trial by jury, because he had not demanded it, which it was his duty to do if he desired a jury trial.

We are of the opinion, as stated before, that *Billigheimer v. State*, *supra*, settles the question, and that the judgment of the court of common pleas should be so affirmed, and it is so ordered.

We have said already as to the second case, that we have not looked into the record because it was not filed in time. It appears, however, that if we had looked into it, we would have found among the affidavits filed one made by the defendant herself, wherein she states that she waived a trial by jury before the police judge. It seems, therefore, that the error that has arisen here has been the omission of the clerk of that court to note that fact. We are clearly of opinion that the only safe and proper rule is for the police court to have that fact noted upon the record, because by the statute the court has no power whatever to try the defendant except he waives a trial by jury.

*D. H. Commager and King & Tracy*, for plaintiff in error.

*Wm. H. Ulery*, Assistant Prosecuting Attorney, for the State.

**BRAKEMAN KILLED BY CAR BEING THROWN FROM THE TRACK.**

[Circuit Court of Licking County.]

ANDREW BEARD, ADMINISTRATOR, v. TOLEDO & OHIO CENTRAL RAILWAY CO.\*

Decided, March Term, 1901.

*Negligence—Heavy Stone Jolted from Car While in Motion—Causing Death of Brakeman—Necessary Proof to Establish Liability on the Part of the Company—Charge of Court.*

A flat car loaded with stone weighing 600 or 800 pounds each was taken into a train, and by reason of the jolting of the car while running at a high rate of speed one of the stone fell off, throwing the car behind it, upon which the brakeman B was riding, from the track, causing his death.

*Held:* That in the absence of proof tending to establish (1) that the car was loaded in an improper or negligent manner, and (2) that the company had or should have had knowledge thereof, (3) and that the intestate did not have such knowledge, the trial court properly instructed the jury to return a verdict for the defendant.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

This action is for damages in causing the death of plaintiff's intestate, Henry Wesley, on June 7, 1893. At the time of his death said Henry Wesley was in the employ of defendant company as a brakeman on one of its freight trains. The accident occurred in this county. The grounds of recovery are:

First. That the conductor in charge of the train negligently took on and attached to said train two flat cars, which were negligently and carelessly loaded with stone; that the loading of the said cars with said stone was done in a careless and negligent manner.

Second. That said cars were defective in attachments, in that neither of them was provided with end boards, or side boards, and were not provided with the proper standards along the edges of the platforms of said cars. That there were no means provided or used to prevent said stone from sliding or jolting off from said cars.

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\* Affirmed by the Supreme Court without report, November 20, 1901.

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Third. That the defendant and said conductor negligently and carelessly took on and attached said cars, so defective and loaded as aforesaid, to said train, and negligently used and operated said cars in said train from a station called Fulton on said road in a southerly direction; and while so operated, and by reason of the high, careless and negligent rate of speed between the stations of Hartford and Johnstown, said stone were carelessly and negligently jolted from said car, and falling on the track, the car on which the decedent was riding was thrown from the track, causing his death.

Fourth. That said Wesley did not know of said defect in said cars, and did not know and was ignorant of the defective and negligent manner in which said cars were loaded.

The petition then sets forth the next of kin of the deceased, and prays judgment.

The defendant company answers by denying carelessness on the part of said company and said conductor, and avers that the death of Wesley was caused by his own carelessness.

The cause was tried, and, at the close of plaintiff's testimony, the court directed a verdict for the defendant; and this is the error assigned and complained of in this court.

The questions of defect in the cars and their appliances are eliminated from the case by reason of the former holding of the circuit court, which was affirmed by the Supreme Court, wherein this court held that this case does not fall within the purview of Section 2 of the act of April 2, 1890 (87 O. L., 149); that the use of such a flat car is not the use of a defective car or one with defective appliances within the meaning of the statute. *Toledo & O. Cent. Ry. Co. v. Beard*, 20 C. C., 682 (affirmed by the Supreme Court without report, December 13, 1898, *Beard v. Railway Co.*, 59 Ohio St., 615).

The question here presented is upon the issue of carelessness; that these cars were negligently loaded with the stone and placed in the train on which the deceased was a brakeman; and, by reason of the careless manner in which the stone were placed upon the cars, and the condition of the cars, in not being properly protected in the loading, that the negligence of the company resulted in the death of plaintiff's intestate. The contention

is that the defendant company was negligent in taking these cars into the train, loaded in this manner, that is, that there were no guards at the ends of the cars, nor at the sides, and the train, running at a high rate of speed, jolted or jarred the stone so that one, at least, dropped upon the track, throwing the car off that the deceased was on, and properly on, causing his death.

We will consider whether the plaintiff has made out a case showing that the company was negligent, and that he was without fault, and, by reason of the negligence of the company, it being the proximate cause of his death, the company would be liable. It would be necessary then for the plaintiff to show:

1. Knowledge on the part of the company. That is, that the company had knowledge of this defect, or negligence with which it is charged, in the loading of the stone upon the car.

2. That the plaintiff's intestate did not know; and that this negligence was the proximate cause of his death.

Taking that view of the case then, how stands the record, or evidence, as to establishing affirmatively these two propositions, which it would be necessary for the plaintiff to establish in order that the company would be liable? We have carefully examined the record. We regard this as an important case, and one that calls upon the court to give the record a careful examination as to whether or not the court, in taking it from the jury, was warranted and justified in so doing on the ground that there was no evidence in the record that could call upon the court to submit the question of negligence as a question of fact for the determination of the jury.

As to the first proposition: As to the knowledge of the company of the condition of the car that is complained of, there is no evidence in the record to show that the company, or any of its authorized agents, had anything to do with the loading of the car. The car was taken into the train, but there is no evidence that the conductor knew of the condition of this car, as to how it was loaded with these stones. The proof tends to show that they were heavy stone, weighing perhaps from six to eight hundred pounds; and the proof tends to show that, with stone of that character and that size, it is the customary way, and the

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ordinary way, to load them without having these end boards or standards to prevent them from sliding or jolting from the car.

It devolved upon the plaintiff to establish the proposition that the company was negligent in that regard; that they were guilty of negligence in the loading of the car, or receiving it into the train; that it was loaded under their direction, and in such a way that they would be responsible for it. As we have remarked, there is no evidence that we have been able to find that even tends to show any knowledge on the part of the company.

As to the second proposition: It is not only necessary for the plaintiff to show that there was negligence on the part of the company in this regard, but that he was without fault; or, in other words, that he had no knowledge of the condition of these cars, and how they were loaded. There is no evidence whatever in the record as to whether he knew it or not; and, therefore, he having the burden on him to show that he did not know, and it standing without evidence, he would fail in the second proposition, or the second branch of the case, which it was necessary for him to establish before he could recover.

This is the situation as the case presents itself without the aid of the statute; and, as we have already observed, the Supreme Court has taken this case out of the provisions of the statute.

But, suppose the case comes within the statute, how does it stand upon the record? Considering the case as one coming within its provisions, the contention of plaintiff in error is that, from additional evidence brought into the record since the first trial, this court will be justified in holding from this additional proof that the case comes within the rule prescribed by the statute.

In the case of *Hesse v. Railroad Co.*, 58 Ohio St., 167, the effect of the statute and its office in an action of this character is clearly defined. Judge Shauck, on page 170, says:

“The act by its terms affects the rules of evidence.

“It does not affect the duty of the employe, nor the rules of pleading with respect to it. In the cases to which it applies it raises against the corporation a *prima facie* presumption of negligence from evidence showing that the employe received an injury by reason of a defect in the car or locomotive, or the machinery or attachments thereto belonging. In *Coal & Car Co.*

v. *Norman*, 49 Ohio St., 598, 607, the general rule governing cases of this character is stated:

“The servant in order to recover for defects in appliances, must establish three propositions: 1. That the appliance was defective. 2. That the master had or should have had notice thereof. 3. That the servant did not know of the defect.”

When we get a proper construction of the statute and its true office, it affects the rule of evidence, but it does not change the necessity of the party alleging and proving these three propositions that are here stated. Judge Shauck further says:

“The force of the statute under consideration is wholly expended in relieving the servant of the duty of establishing the second of these propositions, namely: That the master had or should have had notice thereof.”

That would be the only change that there would be, and the only burden that the plaintiff in this action would be relieved from, if this were a case of a defective car—defective machinery—bringing the case within the provisions of the statute. His duty with respect to the first and third remains wholly unaffected, viz., that the appliance was defective, and third, that the servant did not know of the defect. If the plaintiff fails to establish either one of these propositions, the action can not be maintained.

In this record there is no evidence whatever that the company knew of the condition, or that there was any defect in the loading of these cars. Therefore, there are two essential facts that the plaintiff in this action must establish before he can recover, viz., that there was this defect or this negligence in the loading of the car and the company had knowledge of it; and the deceased did not know of its condition.

The plaintiff must affirmatively establish these facts, either by circumstances, or by direct evidence, or the record must show that there was evidence tending to establish these two propositions, to warrant the submitting of the issue to a jury.

Where there is no evidence tending to establish these facts, then the court has nothing to submit to the jury. If there had been some evidence, or the testimony was conflicting, the facts uncertain or the proper inference to be drawn therefrom



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doubtful, then it would be error for the court to withdraw the case from the jury, or direct them to return a particular verdict.

But these essential facts or propositions the plaintiff failed to establish, either with or without the aid of the statute; and the question of negligence being one of law, it was the duty of the court to take it from the jury. Therefore the court did not err when the plaintiff rested his case in saying to the jury that they should return a verdict for the defendant.

Judgment affirmed.

*S. M. Hunter and Flory & Flory*, for plaintiff in error.

*Kibler & Kibler*, for defendant in error.

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### HOMESTEAD.

[Circuit Court of Cuyahoga County.]

T. I. KERNS V. AUGUSTA F. LINDEN ET AL. \*

Decided, November 11, 1901.

*Allowance of Homestead—Out of Life Estate—Purpose of Section 5438—Property Relieved from Judgment Only While Occupied as Homestead.*

In setting off a homestead in property to one holding a life estate therein, the purpose of the statute is subserved if an amount is set off the fee simple title to which is worth \$1,000.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This action comes into this court by appeal from the court of common pleas.

The facts are that the plaintiff obtained a judgment in the court of common pleas against the defendants, Augusta F. Linden and her husband, John Linden, and that an execution upon such judgment was levied upon about fifty-seven acres of land in this county, in which the defendant, Augusta Linden, has a life estate. On this land is the dwelling house occupied by the two Lindens, husband and wife, and their children, as a family homestead.

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\* Dismissed by the Supreme Court for failure to file printed record.

There is another judgment lien upon the same property, and the purpose of the present action is have the liens marshaled and this property subjected to the payment of the claims of the lienholders. Augusta Linden claims a homestead exemption, and to this she is clearly entitled. The only question is as to the manner of ascertaining such homestead.

On the part of the Lindens it is urged that since the only estate which they or either of them have in the premises is the life estate of Augusta, there should be set off and assigned to her an amount of this property such that her life estate in the amount so set off shall be worth one thousand dollars, and it is said that this will take the entire property.

On the other hand, it is urged that without reference to what estate Augusta holds in the property, there should only be set off to her an amount the fee simple to which is worth one thousand dollars, and that the balance of her life estate be sold for the purpose of satisfying these liens.

The language of Section 5438, Revised Statutes, is:

“The officer executing any writ of execution founded on a judgment or order shall, on application of the debtor, his wife, agent, or attorney, at any time before sale, if such debtor has a family, and if the lands or tenements about to be levied upon, or any part or parcel thereof, constitute the homestead thereof, cause the inquest of appraisers, upon their oaths, to set off to such debtor, by metes and bounds, a homestead not exceeding one thousand dollars in value.”

The purpose of the statute is to save to the unfortunate debtor who has a family, a place where he and such family may live. The property set off is not thereby relieved from being subjected to the payment of the judgment in such wise that it can never be so used, but is relieved only from being so subjected while it is occupied as a homestead for the family.

It is manifest that this purpose will be subserved as well to set off an amount, the fee simple title to which is worth one thousand dollars, to one who only has a life estate, as it would be if the debtor owned the fee simple in the property, for, in neither case, could any benefit be derived by the debtor beyond

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his own life, and that he may have as well where he has a life estate as where he has the fee simple.

tained. See *Brown v. Starr*, 21 Pac. Rep., 973 (79 Cal., 608; 12

Statutes similar to ours and enacted for the same purpose, have been construed in other states, and this view has been sustained. See *Brown v. Starr*, 21 Pac. Rep., 973 (79 Cal., 608; 12 Am. St. Rep., 180); *Yates v. McGibbon*, 66 Iowa, 357 (23 N. W. Rep., 752); *France v. Lucas*, 14 Bush (Ky.), 395; *Arnold v. Jones*, 77 Tenn., 545, and *Crigler v. Connor*, 11 S. W. Rep., 202 (10 Ken. L. Rep., 957).

The order will require the appraisers to set off and assign to Augusta F. Linden land including the house, an amount the fee simple of which is worth one thousand dollars; and the life estate of Augusta in the remainder will be sold. In case such an assignment can not be made by metes and bounds, then the order will be in the usual form, providing for ascertaining the rental value of the property and the application of so much of such rental value as exceeds one hundred dollars a year to the payment of the liens.

*V. A. Andrew* and *F. A. Shepherd*, for plaintiff.

*J. T. Sullivan*, for defendants.

## RIGHTS UNDER A CHATTEL MORTGAGE.

[Circuit Court of Cuyahoga County.]

**MERKEL BROTHERS' CO. v. VINCENT F. DE WITT.**

Decided, October 28, 1901.

*Chattel Mortgages—Acknowledged Before Party in Interest—Does Not Affect Interest of the Party Making the Affidavit—Notice As to His Rights.*

While an officer before whom a chattel mortgage is executed, if interested therein could not maintain his interest against subsequent purchasers, yet such interest would not affect the rights of the party making the affidavit, to the extent of his interest in the debt secured by the mortgage.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The plaintiff in error obtained possession of a piano under a chattel mortgage, which had been executed by one Williams to A. D. Coe. This mortgage was assigned by Coe to the plaintiff in error; it was good as against Williams but, by reason of not having been properly refiled, had become inoperative as against subsequent purchasers and mortgagees in good faith.

Before the mortgaged property had been taken possession of by plaintiff in error, and while said mortgage was so inoperative except as between the parties to it, Williams executed another mortgage upon the same property to the defendant in error; this was given on April 28, 1897, and, upon its face, purports to secure the payment of two promissory notes of that date, one for \$138, and one for \$61.09. DeWitt, on April 29, 1897, made the affidavit required by law to be made in order that a chattel mortgage shall be good as against subsequent purchasers and mortgagees in good faith; and on the next day the mortgage was duly filed with the proper officer. This verification was made before Charles Seeman, a notary public.

DeWitt brought an action in replevin against the Merkel Brothers' Company before a justice of the peace, and, after trial and judgment in that court, the case was appealed to the court of common pleas; it was there tried to a jury, and resulted in a verdict and judgment in favor of DeWitt, to reverse which judgment this proceeding in error is prosecuted.

There is filed in this court a bill of exceptions containing all the evidence. It is urged there was error in the trial of the case in the court of common pleas.

The amended petition upon which the case was tried is an ordinary petition in replevin setting out that the plaintiff has a special ownership in the piano, which is described, by reason of the chattel mortgage made to him as hereinbefore mentioned; that the mortgage was properly filed, and that the defendant detains the mortgaged property from the plaintiff.

To that the Merkel Brothers' Company answered, setting up the mortgage executed to Coe; that the Merkel Brothers' Com-

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pany had become the owner of such mortgage, and that, in an action in replevin brought by the plaintiff in error against the mortgagor, Williams, said company was adjudged to be the owner of the piano; and denies all the other allegations of the petition. The defendant in error replied to this answer by a general denial.

Upon the trial in the court of common pleas the claim was made by the plaintiff in error that the note for \$138, mentioned in the chattel mortgage under which DeWitt claimed, was, in fact, owned at the time of the execution of that mortgage by Charles Seeman, before whom DeWitt made the verification of the mortgage. No contest was made but that the other note described in the mortgage was owned by DeWitt. Evidence was introduced on the part of the Merkel Brothers' Company, tending in some degree to show that this claim was well founded, and that Seeman was, in fact, the owner of the larger note.

It is possible that, under the evidence in the case, if this question had been submitted to the jury for a direct finding upon that issue, it would have so found. The question was not, however, submitted to the jury by itself, but the court charged the jury "that if at the time of the execution of this mortgage and if at the time of the commencement of this action, J. A. Williams was indebted to the plaintiff, and this mortgage was given to secure that debt, executed in good faith for that purpose, we think the plaintiff in this action, and so instruct the jury, would be entitled to recover possession of this property." Again, the court said to the jury:

"But we think that to entitle the plaintiff to recover, it must appear that Williams was at that time indebted to the plaintiff in some sum and that this mortgage was executed in good faith to secure it, and that such indebtedness existed at the time of the commencement of this action, that entitled the plaintiff to bring his action in replevin.

"If he had no valid claim, that is, if Williams was indebted to him in no sum, and this was given without any consideration, then the plaintiff would not be entitled to recover. Otherwise, he would be entitled to recover in this action—would be entitled to a verdict at the hands of this jury finding the right of possession in the plaintiff, with nominal damages."

The court was asked, on behalf of the Merkel Brothers' Company, to charge the jury in these words:

"If the jury finds that Mr. Seeman at the time of the execution of the mortgage from Williams to plaintiff, had not sold his claim to plaintiff, and that the \$138 represented by the note submitted in evidence was not due to plaintiff but was due to Mr. Seeman, the affidavit of plaintiff to mortgage is not sufficient to maintain the validity of the mortgage as against mortgagees in good faith."

This request the court refused to give.

At the close of the charge given, the court was further requested, on behalf of the Merkel Brothers' Company, to charge:

"That if the officer taking the verification was interested in the mortgage it is not a good affidavit."

And this the court declined to give.

It was agreed between the parties at the trial, that if the jury found for the plaintiff, he should have the piano, and that if the jury found for the defendant, it should have the piano. So that there was no question as to the amount of damages submitted to the jury.

It will be seen that the question is distinctly made, whether if Seaman, before whom DeWitt's verification of his mortgage was made, was at the time interested in any part of the debt secured by it, the mortgage was valid as against subsequent purchasers and mortgagees in good faith.

If the fact of interest or ownership by Seeman in the \$138 note at the time of the verification of the mortgage would render the affidavit invalid, then the charge given by the court was erroneous, and the refusal of the requests hereinbefore quoted was erroneous because, as has already been said, the evidence was such that the jury might have found that Seaman was the owner of that note.

In refusing to give the last request, the court gave as a reason for such refusal that a verification was made later by DeWitt for the purpose of refiling the mortgage, before an officer not disqualified by reason of interest or otherwise.

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It is plain that the court overlooked the fact that this last verification was made after the commencement of the action in replevin brought by DeWitt, so that that verification can cut no figure in the determination of the case here.

The law is settled beyond dispute, that a party to a deed or mortgage can not act as an officer to take the acknowledgment of such deed or mortgage. And it is held by many authorities that a party who has an interest in the property mortgaged or in the debt secured by such mortgage can not act as an officer in the acknowledgment of such instrument. The authorities, however, are not uniform upon this point.

In the argument it was assumed that the same rule which govern as to the verification of a chattel mortgage, under the statutes of this state, and, for the purposes of this case, it is proper, perhaps, to make such assumption, though the question is not here determined.

On the part of the defendant in error it is urged that whether Seaman was the owner of the \$138 note or not, the verification made by DeWitt before him would be good and make the mortgage, when properly filed, notice to all the world of whatever interest DeWitt had in the debt secured by such mortgage.

That taking the acknowledgment of a deed or mortgage is held in Ohio to be purely ministerial and in no sense judicial, is settled by *Truman v. Lore*, 14 Ohio St., 144, where, on page 151, Judge Peck uses this language in his opinion:

“The magistrate does not exercise judicial functions in taking such acknowledgment. \* \* \* His act, though official, is purely ministerial and the adverse party is not thereby precluded from showing the grantor’s legal incapacity at the time.”

In *Ford v. Osborne*, 45 Ohio St., Judge Minshall, at page 4 in the opinion, uses this language:

“To say that the taking of an acknowledgment of a deed is a ministerial and not a judicial act, is simply to say that it may be attacked collaterally; it does not impair its value as a certificate made by one acting under authority of law, not only in the matter of taking the acknowledgment but also in certifying the same.”

In *Darst v. Gale*, 83 Ill., 137, the fifth paragraph of the syllabus reads:

"The acknowledgment of a deed of trust taken by one of the trustees is void as to such trustee, but, if the execution of the deed is proved, this will cure the defect."

And, in the opinion, at page 143, this language is used by the court:

"The acknowledgment was taken by Grove, one of the parties named as trustees. This unquestionably rendered the deed void as to him, but we fail to comprehend how it affected the deed as to the other trustees. He and they had no community of interest, and his becoming disqualified had no tendency to disqualify them."

In *Dussaume v. Burnett*, 5 Iowa, 95, it is said in the syllabus:

"An individual owning an interest or share in a tract of land, is not so far interested in the entire land, as to prevent him, in his official character, from taking the acknowledgment of a deed conveying to a third party another and distinct interest or share in the same land:

"The fact that the grantee in a deed and the party before whom the deed was acknowledged had an agreement or understanding that each should purchase distinct shares in the same land with a view to a joint speculation, might be a circumstance tending to show fraud or a fraudulent combination to impose upon the grantors, but in itself would not be sufficient to vitiate the deed."

In *Wilson v. Traer & Co.*, 20 Iowa, 231, the syllabus reads:

"An acknowledgment of an instrument taken and certified by a person interested in it as grantee, should not be admitted to record; and a record thereof would not operate as constructive notice to a subsequent purchaser."

In this case the mortgage was to J. W. Traer & Co.; the acknowledgment was before J. W. Traer, a notary public, who was also a member of the firm to which the mortgage was made. And the holding is distinctly to the effect that though it does not distinctly appear from the instrument itself, that the officer before whom the acknowledgment was made, was interested in the mortgage, yet when that fact does appear, the mortgage



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must be held to be void; and a number of authorities are cited in support of the proposition.

In the case of *Titus v. Johnson*, 50 Texas, 224, the fourth paragraph of the syllabus reads:

"The effect of the record of an instrument concerning lands, on its face regularly acknowledged, or proved for record and duly recorded, can not be attacked by showing that the officer who took the acknowledgment or proof had an interest in the land."

And in the opinion in this case, on page 240, this language is used:

"But here we are asked to hold the record of a deed ineffectual for the purposes for which it was required by law to be made, though in all respects apparently correct and in strict accordance with law on parol evidence adduced by subsequent purchasers long after the deed was recorded, to impeach not the genuineness of the instrument or the verity of the facts stated in the certificate, but to prove matters wholly extraneous thereto, with the view of showing that the officer by whom the certificate was made did not possess the capacity to give the certificate, or was not acting within the sphere of his duty. \* \* \* Certainly we do not feel inclined, in the absence of authority in its support, to give our sanction to a doctrine so detrimental, in our opinion, to public interest, and so well calculated to undermine and destroy the foundation upon which the holders of recorded titles now rest in security."

In *Benson v. Olaf T. Hove*, 46 Minn., 40, the second paragraph of the syllabus reads:

"A chattel mortgage is valid between the parties without acknowledgment. For the purposes of record, it must be acknowledged; but where it does not appear from the instrument that the officer taking the acknowledgment is legally disqualified by reason of his interest in the estate or property mortgaged, the instrument may properly be received for record and such record will be notice to subsequent creditors and mortgagees."

The case of *National Bank v. Conway*, 1 Hughes, 37, is a case decided by the United States Circuit Court for the Eastern District of Virginia. In the opinion, page 40, Judge Hughes uses this language:

“The teaching of the cases cited at bar seems to me plainly to be that an interested person may take the acknowledgment of a deed when the act is merely ministerial, though if the act be judicial, such as taking the acknowledgment after privy examination of a married woman, an interested party can not take it.”

In *Stevens v. Hampton*, 46 Mo., 408, this language is used in the opinion:

“In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule: That when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice, notwithstanding there may be some hidden defect.”

In the case at bar the instrument, upon its face, appears to be, in all respects, properly executed and the affidavit taken before a proper officer. That such officer, if interested, could not maintain an interest in the mortgage as against subsequent purchasers seems to be well settled, but how his interest should affect the rights of the party making the affidavit, to the extent of *his* interest in the debt secured by the mortgage, we fail to see. No one is prejudiced by holding that the mortgage was notice of *his* rights in the property. And from the authorities cited, and many others, it is clear that many courts of high standing have so held. And we hold that whether Seeman owned the \$138 note or not, it being conceded that DeWitt was the owner of the smaller note, the mortgage as to him, to the extent of such ownership, was notice to the world. The result is, that the judgment of the court of common pleas is affirmed.

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**DOW TAX OMISSIONS.**

[Circuit Court of Clark County.]

T. J. CASPER v. J. T. NORRIS.

Decided, December Term, 1901.

*Dow Tax—Complaint of Failure to Pay Assessment—Action of Probate Court Thereon—Ministerial in Character—And Not Reviewable on Error—Judicial and Ministerial Power.*

The action of the probate court upon a complaint that the assessment upon the liquor traffic, commonly known as the "Dow tax," is being evaded is ministerial in character, and the finding of such court upon the complaint is not reviewable on error.

SULLIVAN, J.; WILSON, J., and SUMMERS, J., concur.

In this case the probate court dismissed the complaint filed by defendant in that court, under Section 4364-9a, Revised Statutes. Plaintiff in error, who was defendant below, filed a general demurrer to the complaint setting forth several grounds, one being that the law under which the complaint was drawn and filed was unconstitutional. Upon that ground the probate court sustained the demurrer, dismissed the complaint and entered up a judgment against defendant in error for costs. To reverse that judgment defendant in error prosecuted error to the common pleas. That court reversed the judgment of the probate court, and error is prosecuted here to reverse the judgment of the common pleas.

Counsel for plaintiff in error presented in oral argument three several grounds, upon either or any one of which they insist the judgment of the common pleas should be reversed. It will not, however, be necessary in view of the conclusion we have reached to notice but one, and that is whether the common pleas erred in overruling the motion of plaintiff in error to dismiss the petition in error to the probate court. It is the action of that court upon the motion filed April 12, 1901. The fifth ground of that motion may be construed, we think, as one asking for a dismissal of the petition, for want of jurisdiction in that court.

Sections 4364-9a-9b-9c-9d and 9e, Revised Statutes, in 94 O. L., 332, 333, are supplementary to Section 4364-9, and were passed April 16, 1901. Sections 4364-9 and the several sections following aside from the supplementary sections are commonly known as the Dow law, fixing a tax upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors. Section 4364-9 Revised Statutes, fixes the amount; Section 4364-10, Revised Statutes, makes the same a lien upon the premises in which the business is carried on; 4364-12 provides for the collection of the tax; 4364-13 provides:

“That every assessor shall return to the county auditor with his other returns, a statement \* \* \* as to every place within his jurisdiction where such business is conducted, showing the name of the person, corporation or copartnership engaged therein, a brief and accurate description of the premises where the same is conducted, and by whom owned; said statement shall be signed and verified before such assessor by such person, corporation or co-partnership.”

If on demand, they fail or refuse to furnish the requisite information for such statement, sign and verify the same, the assessment on the business shall be \$400, an increase of \$50 over the amount fixed in Section 4364-9.

Section 4364-14, Revised Statutes, provides:

“That the county auditor shall make and preserve duplicates of such assessments, alphabetically arranged, showing the amount and date of each assessment, by whom to be paid, and the premises whereon the same is a lien. And upon receiving satisfactory information of any such business liable to assessment or increased assessment,” as provided in Section 4364-13, “he shall forthwith enter the same upon such duplicate and upon the county treasurer’s copy thereof.”

Section 4363-9a, provides that:

“Upon complaint in writing to any person, verified by affidavit filed in the probate court of any county in the state of Ohio that any person, corporation or copartnership is engaged in such county in the trafficking in spirituous, vinous, malt or any intoxicating liquor and whose name does not appear on the auditor’s duplicate in such county as \* \* \* engaged in

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such traffic, has refused or neglected to pay the assessment made upon such business, commonly known as the 'Dow tax,' \* \* \* the probate court shall forthwith issue notice to such person, corporation or co-partnership of the filing of said complaint and requiring them to appear before said court at a time therein mentioned, not to exceed four days from the date of the issuing of said notice, and show cause why said business should not be entered upon the duplicate of said county for assessment; and said notice shall be directed to the sheriff of said county, and shall be served and returned by him within the time hereinbefore named in the same manner as summons is served in civil action."

The complaint made by John T. Norris against Casper contains substantially all the matter set out in this section; notice was prepared, served and returned as provided in the section. The purpose of this supplementary act, we think, is apparent. It is to bring upon the duplicate persons engaged in the traffic under the guise and name of a different business, and thus avoid payment of the tax. By Section 4364-13 it is made the duty of the assessor to discover and return all places and names of all persons engaged in the traffic, together with a description of the premises in which carried on, no matter under what guise or name it is conducted. If the matter set forth in the complaint herein was given to the auditor, that officer, if he discharged his duty, has the power to do all that is provided in these supplementary acts, except in the amount of penalty, and the penalty provided for in the supplementary act is to be added by the auditor.

If the probate court upon a hearing found against the complaint, the auditor could still exercise the same power and do the same duty. What is the nature of the power sought to be conferred by this act on the probate court? Is it judicial or ministerial? When exercised by the county auditor it is held to be ministerial (*Musser v. Adair*, 55 Ohio St., 466). The court say in that case the county auditor "in making additions to the returns of a person, of his property for taxation, does not act as a judge. He acts simply as an agent of the state. \* \* \* He is simply a ministerial officer and none other. \* \* \* The township assessor, the auditor and the board of

equalization are all parts of the same system, devised by the Legislature for the assessment of the property of individuals for the purpose of taxation."

We take it that the duty of the county auditor under Section 4364-14 is the same in character as that of making additions terial power when exercised by the auditor, when by a legislative act the same is conferred upon the probate court, does it become a judicial power? In *DeCamp v. Archibald*, 50 Ohio St., 618, 625, the court, in defining judicial powers, say:

"The term 'judicial power' as used in the Constitution is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determining of all suits and actions, whether public or private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter, that is not in the nature of a suit or action between parties. Power to hear and determine matters, more or less directly affecting public and private rights, is conferred upon and exercised by administrative officers."

Judicial powers are those conferred on judges as courts in the hearing and determining of questions arising in litigation between parties in actions pending before them. *State v. Harmon*, 31 Ohio St., 250; *DeCamp v. Archibald*, 50 Ohio St., 618, 624.

The proceedings provided for by Section 4364-9a is not between parties; it is not to secure a right to any one in litigation or to establish the right of any person. Any person without regard to any individual interest or right may file the complaint; in fact he need not be a tax-payer or have any interest to be affected by the failure of the party complained of to pay the tax. So the proceeding sought to be provided for is not adversary in its character, not between parties. It is, as we take it, a duplicate if we may so term it of the one provided the county auditor may take to accomplish the same purpose, no broader in its terms, adding nothing to make it a judicial power. If executed it simply succeeds in placing upon the duplicate the name of one evading tax under the Dow Law; the same thing

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can be done now and could have been done by the auditor before the supplementary act.

Being then simply a ministerial power, error did not lie from the action of the probate court, and the motion of Casper in the common pleas to dismiss the petition in error should have been sustained. The judgment of the common pleas is reversed, and this court entering the judgment that court should have returned, dismisses the petition in error as the common pleas had no jurisdiction to entertain the petition in error from the probate court for the reasons stated. Other errors insisted upon by plaintiff in error are not necessary to be considered. Judgment for costs of this court will be taxed to defendant in error.

*Oscar T. Martin* and *F. M. Hagan*, for plaintiff in error.

*M. B. Earnhart*, for defendant in error.

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### WHAT CONSTITUTES NON-RESIDENCE IN ATTACHMENT PROCEEDINGS.

[Circuit Court of Delaware County.]

GEORGE H. THOMSON v. W. R. OGDEN.

Decided, June Term, 1901.

*Attachment—Residence as Distinguished from Domicile—Non-Residence Under Section 5521.*

1. Residence and non-residence, as used in the statute relating to attachment, are not synonymous and convertible terms with domicile, as applied and used in the general statutes in regard to questions of citizenship, voting and the disposition of property.
- 2 It is the actual residence of a debtor, and not his domicile, that determines his status in an attachment proceeding, begun in the county where the property attached is situated; and if he has no abode or home within the state where process can be served upon him, his property is subject to attachment, notwithstanding he may not have acquired a residence elsewhere.
3. T, while a resident of Ohio, received an appointment for an indefinite term in one of the departments of the government in Washington. He removed there with his family, and for twenty years has continued to live in Washington, but has been in the habit of

returning to Ohio to vote at elections. *Held*: That the property of T located in Ohio is subject to attachment on the ground of non-residence.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

This action was one where defendant in error sought to obtain a lien by proceedings in attachment on certain real estate of the plaintiff in error, situated in the city of Delaware, county of Delaware, this state.

The ground for the attachment was that the plaintiff in error, George H. Thomson, was a non-resident of the state of Ohio; and upon that ground alone it was sought to obtain jurisdiction in the action and secure a lien upon the real estate of plaintiff in error.

From the record it appears that in October, 1883, The Cleveland Paper Company obtained three judgments before a justice of the peace against plaintiff in error; transcripts of the judgments were filed, and entered on the lien docket in the clerk's office of Delaware county. In 1897 the judgments were sold and assigned to defendant in error, W. R. Ogden. November 27, 1899, one Sarah Thomson conveyed "The Delaware Gazette Block" to Henry C. Thomson and George H. Thomson. The judgments had become dormant, and on December 1, 1900, said W. R. Ogden, defendant in error, filed his petition in the Court of Common Pleas of Delaware County, setting up as his cause of action said judgments against said George H. Thomson, and at the same time filed an affidavit for attachment. The sole ground for the attachment was that the defendant, George H. Thomson, was a non-resident of the state of Ohio. The order of attachment was levied on his one-half interest in said real estate. Service by publication was duly made in the action.

Defendant filed a motion to dismiss the attachment on the ground that the allegation in the affidavit that he was a non-resident of the state of Ohio was not true; and by reason thereof the court had no jurisdiction over the subject matter of the action, or of the defendant.

The issue thus raised was submitted on affidavits and oral testimony to the court below, and the motion was overruled.



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The record shows that George H. Thomson was born in Delaware county, Ohio. In December, 1878, he was appointed to a clerkship in the United States Treasury Department at Washington, D. C. He has been continuously so employed ever since. He moved his family to Washington soon after his appointment. He kept house in that city, and his children were raised and educated there. He returned to said city and county of Delaware to vote at the state and national elections held in said state, and voted at such election in said city of Delaware.

The single question presented by the record is, whether, under the facts stated above, the court erred in overruling the motion to dismiss the attachment?

No controlling authority of our own state has been cited, nor have we been able to find any authority in Ohio directly in point. Whether a person is a legal voter or not in the state does not in our judgment determine the question here involved.

Under the attachment laws of this state, the real or personal property of a non-resident debtor is subject to attachment or garnishment by action in a court of competent jurisdiction, commenced in the county where the property is situate.

If residence, or non-residence, as used in the statute regulating attachment proceedings, are synonymous and convertible terms with domicile, as applied and used in general statutes in regard to questions of citizenship, voting the disposition of property and the like, then the question we have here would not be difficult of solution. But we do not so understand the trend of decisions of our Supreme Court. We therefore proceed with the inquiry, without any special reference to any statute other than the one regulating attachments.

A general accepted definition of "residence," when the term is used with reference to the qualification of voters, is synonymous with "domicile." But when applied to attachment laws, "domicile" and "residence" are not convertible terms, for domicile may be in one place and residence for the time being in another. 1 Shinn on Attachment, Section 90, page 148, says: "The term 'non-resident' in the attachment law, therefore, means one who has an abode in another state;" and again in Section 97, page 153: "Non-residence," under attachment laws, "is

a fact and is to be determined by the ordinary and obvious *indicia* of residence. It can not be determined by the place of the debtor's political domicile. One may become a non-resident by living abroad, although by the fact of his intention to return, his political domicile will continue in the state." Citing *Keller v. Carr*, 42 N. W. Rep., 292 (40 Minn., 428).

In *Lawson v. Adlard*, 48 N. W. Rep., 1019, 1020 (46 Minn., 243), syllabi, the court say :

"It is the actual residence of the debtor, and not his domicile, which determines the status of the parties in such proceedings" (attachments).

The facts in the case just cited were these: Adlard was a government employe; he owned a dwelling in the village of Brown Valley, Minn.; he was appointed government blacksmith at an Indian agency, in South Dakota; he took such furniture as was necessary to furnish the house occupied by himself and family at the agency; stored the rest in the upper story of his dwelling at Brown Valley, and rented the lower story for a time. At the end of fourteen months he returned with his family to Brown Valley. In the meantime an attachment was procured against Adlard on the ground of non-residence from the state of Minnesota. The district court vacated and set aside the attachment. The Supreme Court reversed the district court, and in the opinion the court said :

"It must not be determined by construing the words 'residence' as synonymous with the word 'domicile,' for one absent from the state on business or pleasure, having the intent to return, may have a political domicile here, although his residence is elsewhere."

In *Carden v. Carden*, 107 N. C., 214 (12 S. E. Rep., 197), the Supreme Court held :

"Where one voluntarily removes from one state to another for the purpose of discharging the duties of an office of indefinite duration, which required his continued presence there for an unlimited time, he becomes a non-resident of the former state for the purpose of attachment, although he may occasionally visit

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that state and entertain an intent to return and reside there at some uncertain time.

“A non-resident’s property is attachable when his residence is not such as to subject him personally to the jurisdiction of the court, and thus place him upon equality with the other residents of the state.”

Returning again to the facts in this case. The plaintiff in error some twenty or more years ago received a government appointment in the treasury department at Washington, D. C., for an indefinite term of service; he moved with his family to that city, and has lived there ever since; he returned at election times to Ohio, and to the city of Delaware, and at such times voted in said city.

These facts bring his status within Judge Story’s definition of domicile; which definition was adopted by our Supreme Court in *Sturgeon v. Korte*, 34 Ohio St., 525, 535, viz.:

“It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time, as a place of fixed present domicile, and not a place of temporary establishment, or for mere transient purposes, it is to all intents and for all purposes his residence.”

We are unable to distinguish any difference in rule or principle recognized by our Supreme Court in *Sturgeon v. Korte*, *supra*, from that in *Wheeler v. Cobb*, 75 N. C., 21. It is there said:

“That without deciding who, in law, is a non-resident in other respects, but confining the decision to the construction of the statute regulating attachment proceedings, the conclusion is that where one voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which required his continued presence there, for an unlimited time, such a one is a non-resident of this state, for the purposes of an attachment, and that notwithstanding he may occasionally visit this state, and may have the intent to return at some uncertain future time.

“Non-residence, within the meaning of the attachment law, means the actual cessation to dwell within a state for an uncer-

tain period, without definite intention as to a time for returning, a general intention to return may exist." *Weitkamp v. Loehr*, 53 N. Y. Sup. Ct., 83.

The determinative fact in such cases is that the debtor must be a non-resident of this state where the attachment is sued out, not that he must be a resident elsewhere; in other words, he must be so situated that he has no abode or home within the state where process can be served upon him. His property is attachable if his residence is not such as to subject him personally to the jurisdiction of the court and place him upon equality with other residents in this respect. *Waples on Attachment*, 35.

We think, under the proof as shown in this record, the plaintiff in error comes within the rule recognized by the authorities above cited; and that he had such residence in the city of Washington as to subject his real estate in the city of Delaware to attachment, under Section 5521, Revised Statutes of Ohio, and the court of common pleas did not err in overruling the motion to dismiss.

The attachment and the judgment is affirmed.

*C. H. McElroy and W. A. Hall*, for plaintiff in error.

*Charles W. Knight and Frank Marriott*, for defendant in error.

### REASONABLENESS OF AN ESTABLISHED GRADE.

[Circuit Court of Hamilton County.]

CATHARINE WEBER ET AL V. CITY OF CINCINNATI.

Decided, July 1, 1902.

*Street—Grade—Rule as to Reasonableness of, as Established—Evidence—Exception to Refusal of Court to Permit Witness to Answer Saved, How.*

1. An exception to a refusal by the court to permit a witness to answer a question is not properly saved, unless it appear from the record what the answer would have been.
2. The limitation of the liability of municipalities by the Supreme Court to cases where damages result from changing an established grade or establishing an unreasonable grade (34 O. S., 328) does

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not permit of an inquiry into the reasonableness of an established grade, unless it appear that the establishing of the grade was wantonly or recklessly done.

GIFFEN, J. (orally); SWING, J., and JELKE, J., concur.

This was an action to assess damages sustained by property owners by reason of the proposed improvement of Guy street in this city, pursuant to claims filed by the property owners. Upon the conclusion of the testimony the court directed the jury to return a verdict in favor of the city.

It is claimed that the court erred because there was testimony tending to show that the city had established by ordinance an unreasonable grade, and that the defendant, Catharine Weber, had constructed her buildings on the premises and her improvements long subsequent to the establishment of this grade.

It is also claimed that the court erred in refusing to allow witnesses to testify as to the reasonableness or unreasonableness of this grade so established; but in every instance where the court so refused, although the exception was taken to the refusal, it does not appear by the record what the answer would have been had the witness been permitted to answer, consequently the exception was not properly saved.

As to whether the court erred in arresting the case on the ground that the testimony was immaterial under the circumstances of the case, it appears from the testimony that the grade was established in 1875, and that the improvements were made twelve or fifteen years thereafter, and that the resolution for the improvement under this ordinance was passed, I believe, in 1900, about twenty-five years after the establishment of the grade by the ordinance.

In *Akron v. Chamberlain Co.*, 34 Ohio St., 328, the second proposition of the syllabus is as follows:

“The liability of a municipality for injury to buildings on abutting lots, exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade; or where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade.”

Clearly, therefore, had there been no grade established by the city and these improvements had been made, it would have been competent for the jury to inquire whether a subsequently established grade was a reasonable one or not; and it seems on the same line of reasoning that if there is an ordinance establishing the grade and the city has taken no steps to improve in pursuance to that grade for twelve or fifteen years, that the reasonableness of that grade established by ordinance could be questioned by abutting owners. But we have been unable to avoid the force and effect of this syllabus in the case just read, and were we to hold that the reasonableness of this grade so established could be inquired into, it would contravene the doctrine laid down by this case which limits the liability of the city to two classes of cases named therein; and following that decision we must necessarily affirm the judgment of the court below.

But we do not wish to be understood that if it appear that the establishment of the grade by the ordinance was wantonly and recklessly done and that an impossible grade had been established, that anyone would be bound thereby and that that question could not be inquired into; but we think that the testimony offered in this case does not tend to show that the city authorities were not in the proper exercise of the power vested in them.

*J. D. Creed, Otto Renner and Harper & Allen, for plaintiffs in error.*

*Frank H. Kunkel and Albert H. Morrill, contra.*

**OVERWORK RESULTING IN NEGLIGENCE AND PERSONAL INJURY.**

[Circuit Court of Summit County.]

INDIA RUBBER COMPANY v. VINCENT ANTHONY TOBIN.

Decided, April Term, 1902.

*Master and Servant—Negligence—Resulting in an Injury to an Employee—Who Was Overworked and Half Asleep—Assumption of Risk—Charge of the Court Insufficient, When.*

1. An employe exhausted and half asleep from overwork is not thereby relieved from the exercise of ordinary care and prudence to avoid injury.
2. One who is employed at a machine of the usual kind, which is adapted to the purpose and is in good repair, and of the construction and operation of which he has full knowledge, assumes the risk and danger incident to such employment. *Van Duzen Gas & Engine Co. v. Scheffes*, 61 O. S., 298, distinguished.
3. The requirement that the charge of the court to the jury shall be confined to the law applicable to the facts of the case, which the evidence tends to establish, is not satisfied by a reference in a general way to the allegations set out in the petition, without explanation as to their bearing upon the controversy, or effort to distinguish the controlling points of the case from matter of less importance.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Heard on error.

The case of the India Rubber Company against Tobin, error to the court of common pleas. We have encountered much difficulty in determining what ought to be done under this record, but after as mature consideration as we are able to give it, we have reached the conclusion which I will announce.

Tobin was in the employment of the rubber company as an ordinary workman, and was injured while in that employment. He seeks compensation of the rubber company for the loss he has sustained by reason of that injury, and says that it was caused by the negligence of the company, without his fault. The negligence charged, in substance is, that the manufactory had, as a part of its machinery, a machine known as a washer, which

consisted, in part, of massive corrugated iron rolls, less than three-quarters of an inch apart, at the end of which were large and powerful cogwheels by which these rolls were rotated; that the defendant was guilty of carelessness and negligence in not having appliances for stopping the rolls of said washer when in motion, and in not providing any safeguards or appliances for preventing those near the washer from being drawn into and injured by them; that the plaintiff was, at the time of the grievances hereinafter specified, an employe of the said defendant, subject to the orders and directions of one Charles Wheeler, a foreman of said defendant, and superior of plaintiff; that said plaintiff worked on a machine called a calendar, about three feet from said washer; that on or about April 17, 1893, the said defendant had a large amount of work to do, and was running its manufactory night and day, and said defendant carelessly and negligently did not at the time have a sufficient number of skilled operatives to run said calendar without requiring the plaintiff to work much longer each twenty-four hours than he was able to keep fully awake, as defendant then well knew. It is then alleged that by overwork Tobin became so exhausted that on this morning in which he was injured he was so sleepy and so completely exhausted that he was unable to take good care of himself, and being directed by this foreman, Wheeler, to wash his hands at this washer—which is said to be dangerous machinery—in performing that order, his hand was caught within the rollers and he received the injury that he complained of.

It will be noticed then that there are, in this petition, several distinct acts of negligence charged against this company.

Having read the pleadings to the jury, the trial court then said, after stating some propositions of law applicable to the case:

“The pleadings, to which I have called your attention, present for your consideration and determination three principal propositions, which are as follows:

“Was the defendant negligent in one or all of the acts complained of?

“If so negligent, was this negligence the proximate cause of the injury to plaintiff of which he complains?



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"Did the negligence or the want of care on the part of the plaintiff contribute to cause or produce the injury which he sustained?"

Throughout this charge reference to the acts of negligence charged are only called to the attention of the jury by reference to the petition. No explanation of them, or what would constitute negligence in each particular case, is made except in a general way, as follows:

"Coming, therefore, to this case, you will first inquire whether the defendant was guilty of the negligence or some of the acts of negligence specified in the petition."

There are quite a number of references throughout the charge in that general way, and the trial court permitted these allegations of negligence in the petition all to go to the jury with the equal sanction of the court as a ground of recovery on the part of the defendant in error. A glance at those would show that some of them at least could not be the basis of any recovery. A statement of these issues is followed by a number of abstract propositions of law, but without explaining to the jury the application to the particular facts of the case then on trial.

Our Supreme Court has, in a number of cases, referred to charges of this kind; and in *Coal Company v. Estievenard*, 53 Ohio St., 43, 44, the court say:

"The charge of the court to the jury should not be as to abstract propositions of law, but should be confined to the law applicable to the facts of the case which the evidence tends to establish, and the attention of the jury should be called to the controlling point or points of the case, so that the verdict may not be founded upon unimportant matters."

And on page 59, the judge, in delivering the opinion of the court, says:

"The defect in the charge, on the question of contributory negligence is, that it is, in the abstract, dealing with generalities, and failing to deal with the facts of the case as claimed by the parties. Defendant below, by its requests, urged the court to say to the jury, that certain facts, if found by the jury, would pre-

vent a recovery, but the court refused to say what acts on part of plaintiff would defeat a recovery, and contented itself by telling the jury to look at all the evidence, to look at the knowledge of plaintiff, to look at his acts and conduct, etc., without telling them what use to make of such looking, or of the result thereof."

The court, instead of the general propositions, should have called attention to the charges of negligence upon the subject of the machine, the washer, and explained to the jury if it was one in ordinary use in manufactories of that kind, and that the defendant in error had knowledge of that fact, knew about its operation, it was one of the risks he assumed, and could not be considered by them in determining whether the defendant was responsible or not, that the fact whether they had a large number or small number of men had nothing to do with the negligence of the company while this defendant was washing at the washer; and should have explained to the jury the effect of the exhausted condition and the bearing it had upon the questions at issue about which there was not a word said in the entire charge. The jury were permitted to find under this charge that the defendant company did not have men enough in its employment, and, therefore, responsible for this injury; that it did not have this washer properly guarded, and although the defendant in error knew all about it and assumed all risks of danger incident to its use, the company was responsible.

And it seemed to us that the jury were not sufficiently instructed as to the allegations of negligence, by saying, "I refer you to the petition to determine what the allegations of negligence are and how to deal with them, under some general propositions that apply to the relation of master and servant."

Upon this subject of the overwork the attention of the court was called to it by requests, which were refused—the eleventh and fourteenth requests. The fourteenth reads:

"If the plaintiff, at the time of the injury, was in a sleepy or exhausted condition, that fact will not relieve him from the exercise of ordinary care and prudence while using a machine dangerous to operate, and such care and prudence must have been commensurate with the obvious or apparent danger to be

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apprehended from using the machine in question for the purpose for which he did use it; nor will such sleepy condition excuse him from failing to take reasonable precautions for his own safety while washing his hands at said washer."

We think that charge should have been given. Whether his sleepy and exhausted condition enhanced the responsibility of the company in taking care of him, it did not excuse him from the exercise of ordinary care. It is barely possible that the charge covered this in a general way, that the defendant in error must be without contributory negligence himself, use all reasonable care to take care of himself, but on the effect of the particular condition he was in, nothing was said. We think the charge failed to get before the jury definitely the negligence charged in the petition, which could, under the facts of this case, have been made the foundation of a recovery.

Upon another subject the court charged the jury in these words:

"It is alleged in the petition, and evidence has been offered to you tending to show, that the plaintiff, at the time, or just before he received this injury, was ordered and directed by the foreman, Mr. Wheeler, to go to this washer and wash his hands, and that in obedience to said order and command he went to the machine called a washer, and while so engaged his hand was drawn in between the rollers and crushed. On that subject the rule of law is this: That one who, as a servant, does that in his employment which he is ordered to do by his master, and is injured by the culpable negligence of the latter, is not deprived of a right to recover for the injury by the fact that it was apparently dangerous, if a person of ordinary prudence would, under the circumstances, have obeyed the order, provided he used ordinary care in obeying it."

A correct rule of law in a proper case. But the trial court applied to the facts of this case the proposition that is stated in *Van Duzen G. & E. Co. v. Schelies*, 61 Ohio St., 298. This case is sometimes erroneously treated as stating an entirely new proposition recently discovered in fixing the relation between master and servant, and the tendency is to apply it indiscriminately to all kinds and classes of negligence cases in suits by the employe against the employer.

The rule stated in that case has no application whatever to a transaction in which the employe is ordered to work in a place of danger, the risk of which he assumed in entering into his employment. It certainly is not negligence of the master to require or order the employe to work upon machinery, or in a place of danger, the dangers of which he assumed in his contract of employment. In such a case the servant, not the master, continues to take the risk of the danger. Now, in that case, on page 311, the court, in the opinion, says:

“At the time the injury occurred, he (that is, the complainant) was in the employ of the defendant as a ‘vise-hand,’ and had been called by the foreman to assist in the adjustment of a portable gasoline engine with pump and circular saw attached. The saw was in motion at the time and not properly protected; and he was ordered to adjust the shafting of the pump, which was close and next to the saw. He suggested that it was not safe to do so without stopping the saw. The foreman peremptorily renewed the order; he obeyed, his clothing was caught by the saw and he was seriously injured.”

As we understand it, as to the ordinary usual risks in the business in which the employe is engaged, there being nothing unusual, nothing out of the ordinary line, the rule there stated as to the orders of the master has no application; but if in the transaction between the master and the servant, either by what was said between them, or what was done between them, the fair inference is to be drawn that the master in that particular matter, and as to that particular act, assumed the risk of doing that thing, then he alone stands responsible and the employe is relieved, but it must relate to something out of the risk which the employe assumed in the nature of his employment.

An employe working at a machine dangerous in some respects, assumes the risk; and if he continues to work without any notification to the master, upon that machine when out of repair, he still would take the risk of its danger, but if he calls the attention of his employer to the defects and is promised a repair and continues, then the fair inference between them is that the servant is relieved for the time being from the assumption of risk for which he otherwise would be responsible.

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Now, in this particular case it is shown beyond any controversy that this washer was of the usual kind used and proper in a manufactory of this kind, adapted to the purposes for which it was to be used, was in good repair; that the employe had full knowledge of all its construction and its parts. It required no skill to ascertain, apprehend and appreciate the dangers connected with it; he had washed at this very washer in this way, as the proof shows, many times, and we are constrained to say that he assumed, in this particular case, the risk and dangers connected with that employment and working about that machinery.

Again, in this particular case, the order that is shown in this proof was no more than a simple direction, if it existed at all, to this employe to go about the work in the usual way. It was a long time before he could be got to say, while on the stand, that the order was to him to wash at this particular washer. In our judgment nothing more took place here than a simple direction in the usual and ordinary course of doing that business; nothing to relieve the employe from the responsibility he assumed under his employment; and that the charge that I have read had no application whatever to the facts of this particular case.

The result of our investigation is that we hold that the charge of the court was misleading, and, therefore, erroneous; that the particular proposition of the charge that I have quoted as applicable to the case was erroneous; that the court erred in overruling the motion for a new trial because of the fact that the verdict is not sustained by sufficient evidence, and the judgment is reversed and case remanded to the court of common pleas for a new trial.

*Grant & Sieber*, for plaintiff in error.

*E. F. Voris and Rogers, Rowley & Bradley*, contra.

**BANKRUPTCY.**

[Circuit Court of Cuyahoga County.]

JOSHUA K. EXLINE ET AL V. JAS. T. SARGENT ET AL.

Decided, November 6, 1901.

*Bar of a Discharge in—Does Not Include Judgment—For Alienation of Wife's Affections—Purpose of the Exceptions in the Bankruptcy Act—Claims Not Subject to Release.*

The exception found in Section 17 of the Bankruptcy Act of 1898, providing that there shall be no release from a judgment "for willful and malicious injuries to the person or property of another," includes a judgment for alienation of the affections of a wife, and a discharge in bankruptcy is not a bar to such a claim.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

Heard on error.

This is a proceeding in error brought to reverse the judgment of the court of common pleas of this county in a case in which the plaintiffs in error were plaintiffs and the defendants in error were defendants.

The plaintiff, Exline, recovered a judgment in the sum of six thousand dollars against the defendant, Sargent, in the court of common pleas on or about June 26, 1900, an undivided one-half of which judgment he assigned to the plaintiff, Ong. Execution was issued upon such judgment, which was returned wholly unsatisfied; whereupon these plaintiffs brought their action against the defendant, Sargent, and numerous others, it being alleged in the petition that the other defendants had in their hands or under their control certain property of Sargent liable to be applied to the satisfaction of this judgment; the purpose of the proceeding being to have such property subjected to the payment of the judgment.

To this petition the defendant, Sargent, answered and among other defenses made in such answer is the averment that by proceedings duly had in the United States District Court for the Northern District of Ohio, the defendant, Sargent, was discharged in bankruptcy on November 3, 1900. And then this allegation is made:

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“That the claim of plaintiff in his petition filed in the cause in which said judgment was rendered and entered, was as follows: ‘That while the said plaintiff and his wife were living happily together, all of which the defendant well knew, the defendant (James T. Sargent) wrongfully intended to injure plaintiff and deprive him of the society and services of his wife, and maliciously poisoned the mind of his said wife against this said plaintiff \* \* \* defendant maliciously enticed her away from plaintiff and caused said wife to lose the affection and love which she once sustained to plaintiff. That he so alienated the affections of said wife for this plaintiff that this plaintiff’s wife applied for legal separation and obtained it on October 10, 1898. \* \* \* That by reason of the premises above set forth, he has been wrongfully deprived of the affections, society and services of his wife.’”

This allegation of the answer was not denied by the plaintiffs and upon motion by the defendants for judgment on the pleading the court gave judgment in their favor.

On the part of the plaintiffs in error it is urged that the discharge in bankruptcy pleaded did not operate to relieve the bankrupt from liability upon the judgment upon which the claim in the present case is founded.

Section 17 of the bankruptcy act provides, so far as it applies to this case, that—

“A discharge in bankruptcy shall release a bankrupt from all his provable debts except such \* \* \* (2) Are judgments in actions \* \* \* for willful and malicious injuries to the person or property of another.”

Unless the claim of the plaintiffs comes within the exception contained in the foregoing quotation from the statute, the discharge in bankruptcy operated to release Sargent from liability thereon.

Numerous authorities are cited in support of the proposition that a husband may have an action against him who seduces his wife from him, and it is urged that because of this, one is injured in his property when the wife is so enticed away.

It is not always true that one has property in that for injury to which an action may be maintained; that is to say, one may have a right of action for an infringement of his rights where

no property is involved. If this were not true, the language of the bankrupt act itself, where it excepts from the debts of which the bankrupt is relieved by his discharge malicious injuries to the property and to the *person* of another, would be tautological, because certainly one has a right of action against another for injuries to his person, and yet Congress after using the word "property" adds the word "person," clearly showing that there might be injury to one's *person* for which an action could be maintained which would not be an injury to his *property*.

On the other hand, it is urged that *property* can never be separated from *things*; that strictly the word "property" means only *the ownership in things and not the things themselves*, but that, in its true sense, it includes no more than things; and it is, therefore, urged that there can be no property right invaded by the seduction of a wife.

An examination of the authorities, however, shows that many courts of last resort have held the word "property" to have a broader meaning.

In *O'Hara v. Stack*, 90 Pa. St., 477, it is held that the profession of a priest is property. This was in an action where a bishop of the Roman Catholic Church had, in violation of the laws of the church, prohibited a priest of the church from exercising his ministerial functions in the diocese.

In *People v. Harry Cadman*, 57 Cal., 562, it is held that the right to appeal to a higher court from the judgment of a lower court is property; and this was a criminal action, in a case where Cadman was prosecuted for having sent a letter to one Clune which contained a threat to expose him to disgrace if he did not withdraw an appeal which he had taken in a case which had been decided against him. The statute under which the prosecution was had, made it an offense to send a threatening letter "with intent to extort any money or other property from another." And the court held, as already said, that this offense was committed by the sending of such letter with intent to prevent the party from taking his appeal.

The language used in the opinion, at page 564, is:



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“Assuming, as we do, that the right to take and prosecute an appeal is property within the meaning of the code, it follows that a threat made for the purpose of inducing an appellant to dismiss an appeal is a threat made with intent to extort property from another.”

It is urged further on behalf of the defendant in error, that the judgment from the payment of which it is claimed that discharge in bankruptcy released Sargent, was not an injury to his person; and, strictly speaking, this is true; yet in *Delamater v. Russell*, 4 How. Pr., 234, it is held that an action for criminal conversation with the plaintiff's wife was an injury to the person of the plaintiff. In the opinion, this language is used:

“Section 179 authorizes the arrest of a defendant ‘in an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of this state, or is about to remove therefrom, or where the action is for an injury to *person* or *character*,’ \* \* \* I think the act complained of was an injury to the *person* of the plaintiff. It was an invasion of his personal rights. The action was brought for depriving the plaintiff of the comfort, society, fellowship, aid and assistance of the wife.”

Again, this language is used:

“It is not supposed that it was the intention of the Legislature to excuse from imprisonment judgment debtors in actions for *crim. con.*, seduction of a daughter, or beating of a servant; and subject defendants to imprisonment in all other actions for wrong; nor does the statute, in my opinion, demand any such construction. On the contrary, I think the language employed is used in its established legal signification, and though it might have been more explicit, covers the class of actions in question.”

In *Tute v. James*, 46 Ver., 60, 63, this language is used: “The person consists of both soul and body.” It certainly may be well urged that one's mind is subjected to great anguish and thereby injured by the seduction of his wife, and, if that which causes mental suffering is an injury to the person, then this judgment was clearly for an injury to the person of the plaintiff.

In *re Freche*, 109 Fed. Rep., 620, decided in the District Court

of the United States for the District of New Jersey on June 3, 1901, it was held that:

“A judgment recovered in a court of New Jersey for seduction of the plaintiff's minor daughter, which must be based on loss of services but also includes damages for personal injuries to the plaintiff through being subjected to mental anguish, disgrace, etc., is one for a ‘willful and malicious injury to the person or property of another,’ within the meaning of the seventeenth section of the bankrupt act.”

See also the case of 4 Cush., 408.

It may be that it is a somewhat strained construction of words to say that the judgment sought to be enforced in this action was for a malicious injury to either the person or the property of the plaintiff, and yet it can hardly be supposed that it was the intention of Congress to except from the operation of the discharge in bankruptcy those judgments obtained for a malicious assault upon one's person or a malicious destruction of one's chattels, and not except such an injury as that for which *this* judgment was obtained. Doubtless the real purpose of the exception was not to relieve the bankrupt from those debts which were the result of *his own malicious and willful wrongdoing*; and the language used must have been intended for that purpose, and intended to include all such debts. If the claim made by the defendant in error is sound, then the bankrupt would be relieved from any judgment obtained against him for the killing of the plaintiff's wife, for it could be urged in *that* case with as much plausibility as in *this*, that no injury had been done either to the person or the property of the husband.

We conclude, therefore, that the judgment sought to be enforced in this action comes within the exception expressed in the words “willful and malicious injury to the person or property of another,” within the meaning of the bankrupt act; and the judgment of the court of common pleas is reversed.

W. C. Ong, for plaintiffs in error.

E. J. Blandin and Ed. S. Meyer, for defendants in error.

**BENEFICIAL ASSOCIATIONS.**

[Circuit Court of Mahoning County.]

**ANNA EARLEY V. JAMES M. EARLEY AND THE SUPREME TENT,  
K. O. T. M.\***

Decided, March Term, 1902.

*Knights of Maccabees—Benefit Certificates Issued by—Who May Become Beneficiaries—"Dependent" Signifies a Class—Irregularities in Change of Beneficiary—Held to Have Been Waived—Interest of Beneficiary in a Mutual Benefit Certificate Not Vested—And Not Ground for Complaint Where a Change is Made—Findings of Fact by the Court.*

1. The word "dependent" as used in the benefit certificates of the Knights of Maccabees signifies a class by itself, and does not qualify the words "mother, father, sister, brother" which follow.
2. A change in the beneficiary under a policy in a mutual benefit association is not rendered invalid by reason of irregularities, where the change is made substantially as provided for in the laws of the association, and to its full satisfaction and that of the insured, and the highest officers of the association have knowledge of the irregularities.
3. In a finding of facts relative to a change of beneficiary, the material fact to be found was that the second certificate changing the beneficiary was issued, and every intendment is in favor of its regularity.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

This action in the common pleas court was by the Supreme Tent of the Knights of the Maccabees of the world against Anna Earley and James M. Earley. The court made special findings of fact and conclusions of law. No objection is made to the findings of fact, the complaint being by plaintiff in error that the court erred in its conclusions of law from the facts. The facts, as found by the court, that are material to the controversy are substantially as follows:

Section 174 of the Supreme Tent of the Knights of the Maccabees is as follows:

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\* Affirmed by the Supreme Court without report, December 15, 1903.

“Section 174. No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister, brother, aunt, uncle, nephew, niece, cousin, step-child, step-parent, half-sister or half-brother of the member, nor can any such certificate be assigned, willed or in any manner transferred by a member to any other person than the above, and no transfer of a certificate will be binding on the order, unless the member shall make such change as hereinafter provided, and consent thereto is given by indorsement thereon by the supreme record keeper. In case a member desires to change the beneficiary named in his certificate, or reduce the amount thereof, he shall make a written request therefor and deliver the same with his certificate and the sum of fifty cents to the record keeper of his tent. On receiving such written request and the fee therefor, the record keeper shall forward the same to the supreme record keeper, who shall thereupon issue a new certificate bearing the same number as the one surrendered, provided there shall be no law restricting such privilege. Provided, further, that in case the certificate is lost or in the possession of another who refuses to deliver the same to the member, in such case he shall make an affidavit setting forth the fact and forward the same with his request for change to the supreme record keeper.”

The principal officers of the corporation are supreme commander, supreme record keeper and supreme finance keeper, whose official positions shall correspond to that of president, secretary and treasurer, respectively. Members must pay assessments monthly, and failing to do so, shall stand suspended from all benefits of the order until regularly reinstated.

Lewis S. Earley, husband of Anna Earley, became a member of the Knights of Maccabees at Beloit, Mahoning county, Ohio, where the subordinate tent was located, February 18, 1893, and upon the same date, at his request, his life benefit certificate for the sum of \$2,000 was made payable to his wife, Anna Earley, which was immediately delivered by him to her. That said Lewis S. Earley and Anna Earley lived together as husband and wife at Beloit aforesaid to May 30, 1900, and said certificate was kept in the bureau drawer at their residence, the location of which was known to both, and was the last place it was known to be. Afterwards, on March 27, 1899, he made a written request for a change of beneficiary from his said

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wife, Anna Earley, to his father, James M. Earley. This written request was made upon the regular blank of the tent, and in which written request he set forth, "That the certificate in favor of his wife is in the possession of his wife and she would not return the same; that he wished to change the beneficiary on account of disagreement which will be followed by separation. You will understand this, as there are many things too delicate to mention here, and he therefore could not surrender the same for cancellation." This written request containing said statement, also setting forth that he was a member in good financial standing, was delivered to the record keeper of his tent, and was duly authenticated by the officers and seal of his tent and forwarded by the record keeper of his tent to the supreme record keeper. The supreme record keeper received the same and issued a new certificate dated March 27, 1899, of the same number as the original one, designating the father, James M. Earley, as the beneficiary. The new certificate was signed by the supreme commander and supreme record keeper of the supreme tent, and the seal of the supreme tent attached in accordance with the law of the supreme tent, and sent by the supreme record keeper to the record keeper of the Beloit tent, and was countersigned by the commander and record keeper of his tent, and delivered to the said Lewis S. Earley, who delivered it to his father. When the new certificate was issued by the supreme record keeper he stamped upon the written request of Lewis S. Earley for a change of beneficiaries, "original canceled and new certificate issued March 31, 1899." No affidavit of Lewis S. Earley was sent with the request in writing to the supreme record keeper that the certificate in favor of Anna Earley was in possession of another, neither was any such affidavit made by Lewis S. Earley. Lewis S. Earley and Anna Earley lived together until May 30, 1900, when they separated. At no time did the said Lewis S. Earley ask his wife to surrender such certificate, nor did he give her any information that he intended to change the beneficiary, nor did she have any information or knowledge of any change or intended change of the same until after the death of said Lewis S. Earley. Anna Earley, the wife, continued in possession of the certificate designating her

as beneficiary until July or August, 1900, when she lost the same.

Lewis S. Earley died on November 16, 1900, when she, the said Anna Earley, made demand upon the Knights of Maccabees for the payment to her of the \$2,000, the death benefit. The father, James M. Earley, also made demand for the payment to him of the death benefit, under the certificate designating him as beneficiary. Such is substantially the statement of fact as found by the court.

The action of the Supreme Tent of the Knights of Maccabees was in equity to determine who was entitled to the fund, and was in the nature of a bill of interpleader—it bringing the money into court and setting forth in its petition that it had no interest in the controversy farther than to protect itself and see that the proper party obtained the fund. The court of common pleas found that the father, James M. Earley, was entitled to the fund under the second certificate, and rendered judgment in his favor.

Three grounds of error are urged by counsel for plaintiff in error.

First. That the father could not be a beneficiary under the laws of the supreme tent.

Second. That defendant in error practiced a fraud upon the supreme tent in the statement that the certificate was in the possession of the wife and that he could not obtain it.

Third. That the change of beneficiary was not made in accordance with the laws of the supreme tent.

Could the father be a beneficiary?

Section 174 provides as to who may be beneficiaries—wife, husband, children, dependent, mother, father, sister, brother, etc.

It is contended that all the classes after dependent are qualified by the word *dependent*, and that the clause should be read, dependent mother, dependent father, etc., while on the other hand it is claimed that dependent signifies a class of itself. We think the latter is the correct construction. There is nothing whatever to indicate that the word should be read as an adjective or qualifying word. The comma after it, while not in any sense conclusive, very strongly shows that it was intended as a noun, the name of a class. The position of the word is significant.

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It follows immediately after the classes, wife, husband and children, showing, as we think, to intend a class of persons that would be connected with the immediate family or household, as foster children, grandchildren, or others adopted into the household as part of the immediate family and dependent upon the member for maintenance and support.

The case of *Supreme Council Cath. Benevolent Legion v. McGinness*, 59 Ohio St., 531, has some bearing upon the case. The laws of the Benevolent Legion provided that its particular business, among other things, was "to afford moral and material aid to its members and their dependents, by establishing a fund for the relief of sick and disabled members and a benefit fund from which, on satisfactory evidence of the death of a member who shall have complied with all its lawful requirements, a sum not exceeding \$5,000 shall be paid to the family or dependents of each member, as he shall have directed." In that case a brother was made a beneficiary, and it was claimed that he was included in the word "family," it not being averred that he was a dependent, but the court held that could not be so; that while the word "family," in its general significance, would include a brother, yet as used in the laws of the Benevolent Legion it was in a limited sense, and only included those who were the immediate members of the family and dependent upon the member. So here the word "dependent" no doubt was intended to signify a class in the family dependent upon the member, and the after designations enlarged the field as to beneficiaries.

While Section 175 of the laws is not included in the findings of fact and is not considered by the court, yet it shows conclusively that that was the intention of the supreme tent in Section 174. It says:

"Section 175. In the event of the death of the beneficiary or beneficiaries named in the certificate of membership before the death of such member, if no other designation be made, the benefit shall be paid first to the widow, or widower, if living; if no widow or widower, to the children; if no children, to the dependents; if no dependents, to the mother; if no mother, to the father; if no father, to the brothers and sisters, share and share alike."

We all are, therefore, of opinion that the word "dependent" in Section 174 signifies a class, and that the father was a proper beneficiary.

Was the second certificate in which the charge was made, secured by a fraud practiced upon the supreme tent by Lewis S. Earley?

The statement in the written request for change of beneficiary by Lewis S. Earley was that a disagreement had arisen between him and his wife which would be followed by separation. The court found that they did afterwards separate. It also found that Lewis S. Earley at no time asked his wife to surrender this certificate. Under these circumstances we fail to see that any fraud was practiced upon the supreme tent. He set forth in his written request that the certificate was in the possession of his wife, and that she would not return it to him. That all might be true without any request. A husband could be fully satisfied as to what his wife would do respecting such a matter, without a distinct request to return the certificate, and the supreme tent was fully informed by Lewis S. Earley as to all the facts in the written request. It seems to us, from the findings of the court, that he acted fairly and honestly in the matter, and that no fraud was committed.

Was the substitution of the father, as beneficiary, for the wife, legally made; that is, was the first certificate actually canceled by the issuing of a new certificate under the laws of the supreme tent and the law governing and controlling such cases? In other words, which certificate, as between these contesting parties, at the death of Lewis S. Earley, legally existed—the one in which Anna Earley was beneficiary or the one in which James M. Earley was beneficiary?

The supreme tent, by the pleadings, has no interest in the matter. It takes sides with neither party. It is a mere stakeholder, and says to the court, decide between the parties as to who is entitled to the fund.

It is claimed on behalf of the plaintiff in error, upon this branch of the case, that she is entitled to the fund for the reason that the second certificate was not issued in accordance with Section 174 of the laws of the supreme tent, in this, that no affi-



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davit was made and forwarded by Lewis S. Earley to the supreme tent with the written request for a change of beneficiaries, setting forth that the original certificate was in the possession of another who refused to deliver the same to him, and furthermore, he did not deliver to the record keeper of his tent fifty cents with his written request for a change of beneficiary, to be forwarded to the supreme record keeper with his written request.

Was this indispensably necessary? Here we are divided; a majority of the court think it was not, while the other member thinks it was. At this point, however, one suggestion should be made, which will be referred to hereafter, and that is, there is nothing in the pleadings or findings of fact showing that the fifty cents was not delivered and forwarded.

It should be observed at the outset upon his proposition that the manner of the transfer was perfectly satisfactory to the highest officers of the corporation, the supreme tent, to-wit, the supreme commander and the supreme record keeper, who correspond to the offices of president and secretary of ordinary corporations. They received the written request for the change of beneficiary, with full knowledge that it was not verified and that no affidavit accompanied it; also that the fifty cents was not paid (if as a fact it was not paid) and issued the new certificate and canceled the old one, and all through the litigation in the lower court made no objection, and are not now objecting to the validity of the new certificate.

This brings us to the question, what are the legal rights of the beneficiary under such certificates.

It is well settled that the distinction between certificates of beneficial societies and policies of life insurance, in request to changes of beneficiaries, is very marked. Indeed, the law respecting life insurance has very little, if any, application to beneficial societies, and especially upon this particular question. *State v. Protection Association of Ohio*, 26 Ohio St., 19; *State v. Life Association*, 38 Ohio St., 281; *Benefit Societies & Life Insurance* by Bacon, Section 304, 305 and 306.

Whatever rights beneficiaries have in life policies they have by virtue of the contract between the insurance company and the assured. In the case of an ordinary insurance policy the

right of the beneficiary in the policy and to the amount to be paid upon the death of the assured, is a vested right, vesting upon the taking effect of the policy. That right can not be defeated by the separate or the combined act of the insured and the company, without the consent of the beneficiary." *Harley v. Heist*, 86 Ind., 195 (44 Am. Rep., 285); *Damron v. Mutual Life Ins. Co.*, 99 Ind., 478.

The converse is the rule respecting beneficiaries in mutual benefit associations.

"For many, and indeed for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contract evidenced by such certificate and the ordinary contract of life insurance. The most usual difference is the power on the part of the assured in mutual benefit associations to change the beneficiary." *Presbyterian Mutual Benefit Association Fund v. Allen*, 7 N. E. Rep., 317 (106 Ind. 593); *Elkhart Mut. Aid Association v. Houghton*, 2 N. E. Rep., 763 (103 Ind., 286); *Bauer v. Sampson Lodge*, 1 N. E. Rep., 571 (102 Ind., 262); *Bacon Benefit Societies*, Sec. 304.

In *Richmond v. Johnson*, 10 N. W. Rep., 596 (28 Minn. 449), the court said:

"Here is not an ordinary contract of insurance made between an insurance company and another person, the rights of the parties to be determined exclusively by the policy. The right of Charles H. Richmond and of any one claiming through him, depend not on the certificate alone, but rather on his membership in the association; and such rights were defined and controlled by its constitution and by-laws."

"In *Barton v. The Providence Relief Association*, 3 Atl. Rep., 627 (63 N. H., 535); the Supreme Court of New Hampshire says, p. 628:

"The power of appointment is the one thing in the contract which was given to the member, and over that power no other person has any control. The right of its free exercise requires its continuance until death. The appointment by Barton of the plaintiff his wife, to the benefit, at the time he became a member was no bar to his right to appoint another or others by a subsequent change. She was no party to the contract, and acquired

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no vested right in the benefit. The contract was between Barton, her husband, and the defendant, which on the performance of the conditions of membership, agreed to pay the benefit to any person whose name might appear by his entry on the record book or the face of the certificate at his death. The power of appointment being free and continuous, no right to the benefit could vest in the plaintiff until it became certain that her name remained in the certificate, as the beneficiary, at her husband's death. If by the entry of her name as beneficiary the plaintiff acquired any interest whatever in the benefit, it was only a contingent interest which her husband had the power to defeat, and which he has defeated by exercising the power of substitution in the appointment of other beneficiaries."

"It is strenuously insisted that the contract was of such a character that it could not be assigned even equitably by Clark Swift. We think otherwise. Neither the wife nor children had any vested interest, conditional or otherwise, in this insurance money so long as Clark Swift lived and owned and controlled this contract. The contract was between the association and himself. The children paid nothing for their supposed interest. It was a contract which was capable of being rescinded by Clark Swift with the assent of the association."

In the case of *Anthony v. Massachusetts Benefit Association*, 33 N. E. Rep., 577, 578 (158 Mass. 322, 324), it is said:

"The distinction between a policy of insurance and a certificate of a beneficiary association was pointed out by Mr. Justice Devens in *Marsh v. American Legion of Honor*, 21 N. E. Rep., 1070 (149 Mass., 512, 515), and it was said: 'All that a beneficiary has during the lifetime of the member who holds the certificate is a mere expectancy which gives no vested rights in the anticipated benefit, and is not property, as, owing to his right of revocation, it is dependent upon the will and pleasure of the holder.'"

The opinion in this last case is sustained by Mr. Justice Lathrop by a number of cases cited in the report. It is unnecessary to quote further from the authorities to sustain this proposition. Mr. Bacon, in his work already referred to, in a note to Section 306, gives a large number from nearly all the states of the union.

The foregoing citations show the distinction, in the law, respecting life insurance policies and beneficiary certificates and

establish, as we think, beyond controversy, that the beneficiary named in a certificate of a beneficial society has no vested right in the anticipated benefit; it is not property, but a mere expectancy which may or may not ripen into property. This arises from the fact that the member, under the law of such societies, may change the beneficiary at any time by and with the consent of the society; therefore, during the life of the member, the expectancy may at any time be destroyed and the expectation blighted. It is a mere gratuity on the part of the member to be enjoyed at his death, provided he does not change his mind. It could not be hypothecated; it would not be assets in a bankrupt court; it has no value in the market; it could not be subjected to the payment of the debts of the beneficiary; indeed, it has no value whatever until the death of the member, for the reason, as we have said, it may be entirely annulled at any time during his life, by the member, with the consent of the society. We do not mean by this that the beneficiary has no interest. An expectancy is an interest which can only be taken away in a lawful manner. A beneficiary under a will has an interest which continues until it is revoked in a manner provided by law. Such, we understand, to be the holding in *Charch v. Charch*, 57 Ohio St., 561. In that case the court held:

“Where a member of a beneficial association organized under Section 3630, Revised Statutes, has caused the beneficial certificate issued by the association upon his life to be made payable to his wife, such member can not change the beneficiary except in the mode pointed out by the by-laws of the association. And where such by-laws provide that a change of beneficiary can be made only by surrender and issue of a new certificate, such change can not be made (the wife being in life) by will.”

Spear, J., in the opinion on page 578, says:

“By the undisputed facts it is established that the certificates in question were issued to the wife and so remained. Under the law, her interest in them, while not a vested one during the husband's life, was such as he could not change by testamentary disposition. When these laws provide, as those of these two orders do, a method by which the beneficiary may be changed, that method must be pursued, and where no change is thus made, the company's promise to pay runs only to the person named in the certificate.”

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This is but the statement of a familiar legal principle, that where a power is granted, that power can only be exercised in the manner provided for in the instrument creating the power and can not be exercised in any other manner. There are a few cases that hold to a different rule and decide that the member may change the beneficiary at his will and in any manner, irrespective of the laws of the association. That is the holding of the cases in Texas and of the cases that follow the Texas rule, but they are few in number and not founded on reason. Such a rule would be almost subversive of beneficial insurance. The society would never know until the death of the member, who were its beneficiaries, if the member could change the beneficiary without the concurrent act of the society.

This provision, however, is for the benefit of the society and not of the beneficiary, and the manner of its enforcement is for it alone to determine. The beneficiary is in no manner a party to the contract; the agreement respecting the manner of change is between the society and the member. All the interest or right the beneficiary has is that the change shall be made according to the laws of the society, to the satisfaction of the society and member, and not contrary to the law of the land, and the organic law of the society. The insured could surrender the benefit certificate at any time.

How much of the rule shall be insisted upon and how much waived is a matter alone for the determination of the society. No notice whatever is required to the beneficiary of the intended change; he or she has no right to be heard or offer any objection. In this case, Section 174 of the laws of the supreme tent shows that conclusively. The whole theory of the system of insurance by beneficial societies establishes this proposition; it is the poor man's system by which he provides a gift for the benefit of those depending upon him to go to them at his or her death. This is not only in accordance with principle, but is supported by an almost unbroken line of authorities. Bacon Benefit Societies, Section 308; Niblack Benefit Societies, Sections 218 to 223, inclusive, and authorities therein referred to.

I will refer to but a few. In Section 308, at the outset, Mr. Bacon says:

“Although the rule is settled that change of beneficiary must be made in the manner prescribed by the laws of the society with some exceptions, it is also now equally well settled that the society may waive compliance with the required formalities.”

In *Manning v. Ancient Order of United Workmen*, 5 S. W. Rep., 385, 386 (86 Ky., 136), the laws of the order provided that a member might at any time change the beneficiary by revoking the first designation and designating a new beneficiary in a form given on the back of the certificate, having the same attested by the recorder of the subordinate lodge with its seal thereto attached, and paying a fee of fifty cents for a new certificate, which was thereupon to be issued by the supreme lodge upon receipt from the local lodge of this old certificate and attested revocation, and the fee. In this case the member had left the certificate in charge of the local lodge. Subsequently he married and wrote the lodge, enclosing his dues and requesting the officers to send him the certificate made out to his wife. No fee was sent, and the officer of the lodge wrote to him for it. Nothing was done until after the death of the member, when the recorder of the lodge certified the letter to the supreme lodge, which issued the new certificate as requested and afterwards paid it. The suit was by the first beneficiary; judgment was given by the lower court for the defendant, and, in affirming this, the court of appeals said:

“The appellant had but a contingent right to the benefit; not a vested and absolute one. It was subject to be defeated at the will of the assured. The law of the order, as above cited, provides how this shall be done. The regulation is a reasonable one; but the question arises whether it shall govern as between the claimants to the benefit, if the order has seen fit to waive it. We think not. Its object, beyond doubt, was to prevent the appellee from becoming involved in litigation with outside claimants. \* \* \* The direction by the insured to change the benefit was, in the case now under consideration, given through the proper channel. The subordinate lodge referred it to the proper authority, and it saw fit to waive the regulations intended for its benefit and comply with the direction, although made in an informal manner and without the payment of the fee. The *intention* of the assured was to change the benefit. He so directed in writing; and now because he did not do so in the formal

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manner prescribed by the law for the benefit of the order, it is asked by a third party, whose interest in the insurance was liable to end at any time at the will of the assured, that his intention shall be defeated, although the party for whose benefit the form was prescribed has seen proper to waive it. Such a rule would sacrifice substantial justice to mere form; it would tend to defeat the benevolent aim and purpose of the organization and the desire and intention of the insured. Members of the order may be remote from their lodge; they may not have their certificates with them, and therefore be unable to make the indorsement thereon as directed, or to have it attested by the recorder of their lodge or its seal attached thereto. If the appellee chooses to waive these formalities it does not lie in the mouth of a third party to complain. The order is entitled to know who is entitled to the benefit fund; and the formal mode of changing its directions is for its benefit; while upon the other hand, the right of the beneficiary rests in the mere will of the assured." See to the same effect, *Titsworth v. Titsworth*, 20 Pac. Rep., 213 (40 Kan., 571); *Marsh v. Legion of Honor*, 21 N. E. Rep., 1070 (149 Mass., 512); *Martin v. Stubbings*, 18 N. E. Rep., 657 (126 Ill., 387); *Knights of Honor v. Watson*, 15 Atl. Rep., 125 (64 N. H., 517); *Beatty's Appeal*, Supreme Court of Pennsylvania, 15 Atl. Rep., 861 (122 Pa. St., 428).

Niblack on Benefit Societies and Accident Insurance, in Section 219, after referring to the fact that where the mode of changing the beneficiary is specified in the contract it must be substantially followed, says:

"It seems clear, however, that this rule should be held to apply only to those cases in which the original contract is in existence, and where an attempt was made by the member to change the beneficiary of that contract. Where the original contract has been surrendered by the member and abandoned by both parties to it, the member and the society, it is difficult to see what rights remain to the beneficiary under it. The member and the society have a right to change the terms of the contract by passing new by-laws or otherwise, without the consent of the beneficiary, and it is certainly competent for them to agree to abandon the contract and substitute a new one on substantially the same terms. They are the contracting parties, and the beneficiary has no vested interest until the moment of the death of the member during the continuance of the contract. Where the contract in which he had an expectant interest has been abandoned, and a new one has been taken out in its stead, payable to another, he

has no legal ground of complaint. There is no longer a contract in which he is even contingently interested. In most of the cases where the original certificate had been surrendered, and a new one issued, payable to another person, the court considered the question raised by the first beneficiary, whether the change of beneficiaries had been made substantially according to the terms provided in the original contract. It would seem, however, that the first beneficiary, having had no vested interest in the original contract, had no legal right to urge that question; and it would also seem in those cases that the real question for the court to decide was whether there had been an abandonment of the original contract, and not whether there had been an abandonment of one contract and the substitution of another in the manner provided in the contract for the change of beneficiaries. The member and the society are the parties to a contract of mutual benefit insurance, and they may during the life of the member agree upon a change of beneficiaries in any manner which is satisfactory to both parties. When they have agreed upon a new beneficiary, a new contract is in force, and, to the extent of the modification made, the old contract is abandoned and superseded.

“When a society has accepted the surrender of a certificate from the member and issued a new one payable to a new beneficiary, or when a society has actually changed the beneficiary at the request of a member, all questions as to whether the manner and mode of changing beneficiaries provided in the contract have been followed are concluded and absolutely disposed of. But where the society and the member did not, during the life of the member, agree upon a change of beneficiaries, where the original contract is in existence, and a right under it has accrued to some one, the original beneficiary will be heard to insist that he is entitled to the proceeds of it because the power of appointment of another person in his stead was not made by the member, one of the parties to it, according to its provisions. To this extent and no further does the rule apply that when the mode of changing the beneficiary is specified in the contract, it must be substantially followed.”

Mr. Niblack sustains his text by numerous authorities, and in note 2 says:

“In most of these cases it was held that there had been a substantial compliance with the terms of the contract relative to changing beneficiaries, but the logic of the cases sustains the doctrine as laid down in the text. In *Coleman v. Supreme*



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*Lodge*, 18 Mo. App., 189, it was held that the beneficiary named in the old certificate was not deprived of her rights, and that the society was not made liable by the issue of a new certificate in place of the old one, when the change of beneficiaries had not been made according to the prescribed manner. But this decision is against the fundamental principle of mutual benefit insurance, that the contract is between the member and the society, and that the beneficiary has no vested interest in the contract during the life of the member. This case, though an early one, has never been followed."

We will refer to but two other authorities on this question.

In the case of *Supreme Conclave Royal Adelpia v. Capella*, 41 Fed. Rep. 1 (U. S. Circuit Court, E. D. Michigan), Hon. Henry B. Brown, now one of the judges of the Supreme Court of the United States and of eminent ability, in an exhaustive review of the cases, in the second paragraph of the syllabus lays down the following rule:

"The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions. (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been issued."

In the opinion upon the first exception he says, p. 4:

"If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. This naturally follows from the fact that, having no vested interest in the certificate during the lifetime of the assured, he has no right to require that the rules of the association, which are framed

alone for its own protection and guidance, are not complied with."

Mr. Bacon, in speaking of this decision of Judge Henry B. Brown in Section 310 of his work, says:

"This statement of the principles involved will probably always be followed."

In the case of *Anthony v. Benefit Association*, *supra*, it is said, p. 578:

"The remaining question relates to the manner in which the assignment was assented to. The fifth condition requiring an alteration of a contract to be in writing and signed by the treasurer, and the rule of the association requiring both the member insured and the present beneficiary to sign the form of assignment, we regard as merely regulations framed for the protection of the association, which it may dispense with if it sees fit (see *Supreme Conclave v. Capella*, 41 Fed. Rep., 1, 4, and cases cited). If the original beneficiary had not a vested interest in the certificate, the member could assign it without their assent. The assent of the association was sufficiently manifested by the signing of the treasurer's name by the clerk who acted in so doing under the general authority of the treasurer."

Does the decision of *Charch v. Charch*, *supra*, in any manner conflict with this line of authorities? We think not. In that case the insured attempted to change the beneficiary by will, when the laws of the Legion of Honor provided as to the manner, and the only manner in which the change could be made, which did not include by will, and the court held that the change could not be made by will, but must be made in accordance with the by-laws of the society. The society did not act at all. The insured undertook to act entirely independent of the society, and make the change in direct opposition to the laws of the society.

No question of waiver by the society was involved. Furthermore, the will did not speak until the death of the member. The legatee had no vested right until his death, and at his death the beneficiary, his wife, under the certificate, had a vested right which could not be divested without her consent. The case is in

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no respect analogous to the case under consideration and should have no effect upon it.

Did the supreme tent waive the literal performance of the requirements of Section 174? As we have stated before, it received the written request with full knowledge of what had been done. It knew no affidavit had been made, as required. It knew the fifty cents had not been sent with the written request—if it was not sent. With this full knowledge it canceled the old certificate and issued the new one, changing the beneficiary. All this was done by the very highest officers of the society—the supreme commander, and the supreme keeper of records—who had, under the laws of the society entire authority and control over the change of beneficiaries and the society is still satisfied with what it did.

A pertinent inquiry here is, was not the change of beneficiaries made in accordance with the laws of the supreme tent? It could not be claimed that anything more was required than that the rules as laid down in Section 174 should be substantially followed. Niblack on Benefit Societies, Section 218.

All the irregularity that is claimed is that the statement of the assured was not verified and the fifty cent fee was not sent to the supreme record keeper. Everything else was perfectly regular to the letter of the law. The statements in the written request for change of beneficiaries were full and complete. There was nothing in it that was not absolutely true and is so conceded, but the statement was not sworn to. What was there substantial in that omission? No one was misled; no one was injured; and so as to the failure to remit the fifty cents—if it was not remitted. If the supreme tent saw fit to charge the assured with it, or even waive it, certainly it was a trifling matter. If the will, intention and expectation of the insured are to be baffled and frittered away upon such a flimsy pretext, then truly this most popular form of insurance that goes into the homes of the masses would indeed be a snare and a delusion. Mr. Niblack in Section 218, *supra*, says:

“This rule should not be applied with too much particularity and exactness in matters of detail but should be substantially followed.”

But it is claimed that the supreme officers of the tent had no authority to issue the new certificate, and that the new certificate is, for that reason, invalid.

It is said that this is a mutual insurance society; that each member is a stockholder and presumed to know the laws of the society, therefore, that the supreme officers had no authority whatever to change the beneficiaries by issuing a new certificate until the rules had been literally complied with; that each member has a right to demand this strictness, and the society or original beneficiary is not estopped by their acts. Such is not the law. In the first place, as we have seen, the law governing beneficial societies in changing beneficiaries is entirely different from the law controlling ordinary mutual insurance companies. They are not organized for profit at all, but are benevolent societies.

Every case heretofore referred to are cases in which the officers acted in waiving the provisions of the rules of the society in making transfers of beneficiaries and in cancelling old and issuing new certificates without strict performance of the rules of the society respecting transfers of beneficiaries, and without any special authority delegated for the purpose. Indeed, such is not the law governing life insurance generally. Nearly all life insurance companies are mutual companies. The policy holder has an interest in the funds of the companies for the payment of dividends. Frequently he is a stockholder. He gives premium notes and is liable to assessment upon the same, and yet it has always been held that the company is estopped from denying the authority of its general agents for acts done in the line of their agency. No authorities are needed for the support of such a familiar rule of law.

These supreme officers received the written request and statement of the insured with full knowledge of all that had been done and all that was left undone. They deliberately canceled the old certificate and issued the new with all the formalities of the laws of the supreme tent.

The assured received the new certificate and acted upon it for twenty months, until his death. He paid his death assessment regularly every month. He died in full belief that his father was his beneficiary. Can it now be said the certificate was in-

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valid by reason of the want of authority on the part of the supreme officers? We think not.

In the case of *Ball v. Mutual Aid Association*, 9 Atl. Rep., 103 (64 N. H., 291), the insured represented to the society in his application for a benefit certificate that he did not have catarrh and never had it, yet the medical examiner's certificate showed he did have catarrh. Suit was brought upon the certificate by the beneficiary after the death of the insured. The company defended upon the ground of the misstatement in the application, but the Supreme Court of New Hampshire held the society was bound, its supreme officers having knowledge that the insured did have catarrh when he made his application and that, having accepted the monthly assessments from the insured, it was estopped from making the defense. To the same effect see *Bacon on Benefit Societies*, Sections 95 and 225.

But one other question remains for consideration. In the discussion of the case we have treated it as if the fifty cents required to be deposited with the record keeper, and by him transmitted to the supreme record keeper, had not been so deposited and transmitted. The findings of fact by the court does not show such to be the fact; neither do the pleadings admit it. It is claimed by the plaintiff in error that every fact must be distinctly found by the court necessary to sustain the judgment of the court, and that every fact not so affirmatively specially found is presumed not to exist. In other words, that the fifty cents fee is presumed not to have been paid if the findings of fact do not distinctly show it. We can not subscribe to this being the law. In this case the second certificate was issued by the supreme tent, and the presumption would be that everything was done required to be done under the laws of the supreme tent, if the findings of fact do not show to the contrary. The material fact to be found was that the second certificate changing the beneficiary was issued, and every intendment is in favor of its regularity.

In the case of *Carpenter v. Warner*, 38 Ohio St., 416, the court held:

“Where a court is requested under the statute to find and state the facts and law separately, and no objection is made at the

time to the sufficiency of the facts found, a party can not avail himself of a defect in the findings in a court of error, but must submit to such judgment as the facts found require."

If the facts as found by the court were not sufficiently definite, the defendant in error should have had the defect rectified in the court below. In the case of *Jack v. Hudnall*, 25 Ohio St., 255, the court held:

"Where the finding of facts by the court fairly admits of a construction which will support the judgment, that construction will be adopted rather than a different one which would render the judgment erroneous."

In *Peter v. Manufacturing Co.*, 56 Ohio St., 181, 186, 207, it is said:

"In reviewing a judgment based upon a finding of fact, a reviewing court should steadily lean towards that construction of the finding which would support the judgment; but where, after applying this principle to its fullest extent nevertheless, the reviewing court finds itself in great doubt concerning the grounds upon which the judgment was founded, it, in the exercise of a sound discretion, should require the court rendering the judgment to find the facts more specifically."

It is true that if the judgment can not be sustained upon the facts as found by the court it must be reversed, or if any material fact is not found by the court which is necessary to support the judgment it must be reversed for the reason that it will be presumed that all facts were found that the evidence justified. *Springer v. Avondale*, 35 Ohio St., 620-623.

That is not this case, for the reason that a fair construction of the fact found by the court, to-wit, the issuing of a certificate in favor of defendant in error, James M. Earley, raises the presumption, as we have said, that the fee of fifty cents was deposited and remitted.

Judgment of common pleas court affirmed.

*Jones & Anderson*, for plaintiff in error.

*Jared Huxley, R. B. Murray and D. D. Autkin*, for defendants in error.

**CONSTRUCTION OF WILL.**

[Circuit Court of Cuyahoga County.]

**JAMES SILK, ADMINISTRATOR, v. JOHN S. MERRY ET AL.**

Decided, November 18, 1901.

*Wills—Bequests—Fee Simple and Life Estates—Significance of the Connectives "And" and "And Also"—Presumption as to Intention of Testator—General Legacies to be Paid Out of Personal Property—Consumption of Personal Property—Section 5970, Providing That an Estate Shall Pass in Fee, Unless.*

1. A bequest of specific real estate, out of which no debt or legacy shall be paid, "and the rest and residue of my real property to have and hold during the term of his natural life," is a bequest of a fee simple estate in the property first mentioned, and of a life estate in the remainder.
2. In determining the extent of the estate devised, the word "and" will not be regarded as equivalent to "and also"; and a presumption as to the intention of the testator will be considered.
3. A bequest of "so much of my personal property as he may desire to use absolutely," conveys the right to consume as well as to use.
4. Unless otherwise directed by the will, general legacies are to be paid out of the personal property, before resort is had to the real estate.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This cause comes into this court by appeal from an order of the court of common pleas.

The petition was filed under favor of Section 6202, Revised Statutes, and was apparently tried in the court of common pleas without any question being raised, either by the court or counsel, as to the jurisdiction of the court to determine the questions sought to be determined in the action, and except as suggested by the court, no question has been made in this court as to such jurisdiction.

As all the parties interested in the matter are in court and no question is made as to the jurisdiction, we proceed to dispose of the case upon the assumption that we have such jurisdiction, though the question is by no means free from doubt.

Sarah Silk, who was a resident of this county, died testate

on January 6, 1899. Her will, which consisted of an original will and codicil, was duly admitted to probate, and James Silk, who is the surviving husband of the testatrix, was duly appointed and qualified as administrator with the will annexed of the estate of the decedent, and files his petition in that capacity. A copy of the will, including the codicil, is annexed to the petition, and the prayer is that the court determine the true intent and meaning of such will and the proper construction thereof.

The date of the original will is uncertain; the language of the will as to the date, is, "In witness whereof I hereunto set my hand and seal this first day of July, 1893, A. D. 1892." And such date is left uncertain by the codicil. The codicil, however, is dated April 27, 1898. It is immaterial, however, whether the original will was executed in 1892 or 1893.

The will and codicil read as follows:

"I, Sarah Silk, of the village of West Cleveland, Cuyahoga county, state of Ohio, being of sound mind and memory, do make and publish this my last will and testament hereby revoking all other wills by me heretofore made.

"Item 1. I direct all my just and lawful debts and funeral and testamentary expenses to be paid out of my estate.

"Item 2. I give and devise to my beloved husband James Silk my real property fronting on Detroit street in the village aforesaid out of which I direct that no debt, legacy or other charge herein provided for shall be paid or taken and the rest and residue of my real property to have and to hold during the term of his natural life.

"Item 3. I give and bequeath to John S. Merry, of 67 Hackman street, Cleveland, Ohio, son of my deceased sister Eliza, two thousand dollars, to be paid out of the residue of my estate.

"Item 4. I give, bequeath and devise the rest and residue of my estate to the heirs of my deceased husband, William Sheppard, the children of such of his heirs as may die prior to my decease to take their parents' share.

"Item 5. If under any circumstances the property conveyed to my husband, James Silk, aforesaid, by his mother, Maria Silk, by deed dated April 1, 1879, and recorded Vol. 300, page 268 of the record of deeds of said Cuyahoga county, should be-



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come my property by descent, then and in that case I give and devise the same to the heirs of said Maria Silk.

"In witness whereof I hereunto set my hand and seal this first day of July, 1893, A. D. 1892.

[SEAL.]

"SARAH SILK.

"Subscribed by testatrix in our presence who acknowledged to us the foregoing instrument to be her last will and testament and by us subscribed as witnesses in her presence at her request and in the presence of each other the day and date last above written.

"10 Johnson street, West Cleveland,

"MARY A. WILLOWS,

"JULIA WILKS,

"22 Courtland street, Cleveland, Ohio.

"Whereas, I, Sarah Silk, have made my foregoing will dated the first day of July, 1893, A. D. 1892, I make this my codicil to the same.

"Item first. I give and bequeath to my beloved husband so much of my personal property as he may desire to use absolutely in addition to the provision made for him in item second of my said will.

"Item second. I reduce the amount of the legacy given in item third of my said will to John S. Merry from two thousand to one thousand dollars.

"Item third. I give and devise to the West Madison Avenue Church of Christ in the city of Cleveland, Cuyahoga county, Ohio, sub-lot No. 13 in my subdivision on Sheppard (Shepherd) street now in said city.

"In witness whereof I hereunto subscribe my name this twenty-seventh day of April, A. D. 1898.

"SARAH SILK.

"Subscribed by testatrix in our presence, who acknowledged to us the foregoing instrument to be her codicil to her last will and testament, and by us subscribed as witnesses in her presence at her request, and in the presence of each other, the day and date last above written.

"HUGH THOW,

"EDWARD MERRY,

"Cleveland, Ohio."

The facts are, that the estate left by the testatrix consisted of both real and personal property; that there remains of the personal property, after the payment of all debts and expenses of

administration, something more than two thousand dollars in money; that the real estate consists of the property spoken of in the second item of the will as fronting on Detroit street, in the village of West Cleveland, and several vacant lots in the same village. This village has now been annexed to the city of Cleveland. The Detroit street property consists of a modest dwelling-house and a lot, the net income of which in its present condition is practically nothing; that is, the taxes, assessments, repairs and insurance would very nearly, if not quite, equal all the income which could be obtained from it in its present condition, and this is substantially true as to the balance of the real estate.

At the time of the execution of the original will, whether in 1892 or 1893, the health of James Silk, the husband of the testatrix, was good; he was then about sixty-two or sixty-three years of age, and was able to earn a comfortable support for himself. Before the execution of the codicil, Mr. Silk had met with an accident which has ever since rendered him unable to do any laborious work and practically unable to earn anything toward his support. Aside from the property bequeathed to him by the testatrix, he has very little, if any, means.

All the property of which the testatrix died seized, came to her under the will of a former husband, William Shepherd.

The items which the court is especially asked to construe, are first, the second item of the original will, which reads:

“Item 2. I give and devise to my beloved husband James Silk my real property fronting on Detroit street in the village aforesaid out of which I direct that no debt legacy or other charge herein provided for shall be paid or taken and the rest and residue of my real property to have and to hold during the term of his natural life.”

The copy of the will attached to the petition is without any mark of punctuation after the period following the figure 2 until the end of the item, where there is a period. It is said that the original will is in the same condition, and it is urged on the part of the plaintiff that by this item the surviving husband takes a fee simple title to the Detroit street property and a life estate in the balance; while on the part of the defendants it is urged that the qualifying words “to have and to hold dur-

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ing the term of his natural life," apply as well to the Detroit street property as to the balance of the real estate.

Section 5970, Revised Statutes, reads:

"Every devise of lands, tenements, or hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

We are of opinion and so hold, that it does not clearly appear by this item of the will that the testatrix intended to convey to the devisee less than the fee-simple.

The words immediately following the devise of the Detroit street property, to-wit, "out of which I direct that no debt legacy or other charge herein provided for shall be paid or taken," indicate clearly a distinction to be made between the devise of the Detroit street property and the balance of the real estate. Except for such, there seems to be no reason why the Detroit street property should have been specifically mentioned at all, because if he was to take a life estate and a life estate only, in the Detroit street property, as well as in the balance of the real estate, *then* a devise of "all my real estate to my beloved husband James Silk to have and to hold during the term of his natural life," would have expressed exactly the meaning of the testatrix.

It is said, however, that these words, above quoted, following the devise of the Detroit street property, indicate exactly the distinction that was to be made between the two; but without these words the life estate could not have been subjected to the payment of any of the debts or legacies until the personal property had all been exhausted and the remainder in the real estate after the determination of the life estate had also been exhausted.

It will be observed that the language is stronger than simply that *no debts or legacies are to be paid*, because after the word "paid" follow the words "or taken?" It will further be observed that the two clauses of *Item 2*, to-wit, the clause by which the Detroit street property is devised, and the clause by which

the balance of the real estate is devised, are connected by the word "and" alone.

In *Noble v. Ayers*, 61 Ohio St., 491, it is held that where certain described real estate is devised to one, followed by the words "and also," another described parcel of real estate to the same devisee and that followed by the words "for and during her natural lifetime," created an estate in the devisee for life only in each parcel so devised. An examination of the opinion, however, shows that stress is laid upon the use of the words "and also," saying that these words are equivalent to "in like manner."

To the same effect is *Morgan v. Morgan*, 41 N. J. Eq., 235, and numerous other authorities which are found in 2 Am. & Eng. Enc. Law (2d Ed.), 177.

We are cited to one authority, and one only—nor have we found any other after a somewhat diligent search—where in a will the word "and" is construed as being equivalent to the words "and also." This is *Spirt v. Bence*, 4 Croke, 368. The case is an old one, adjudged in the reign of Charles I, and, so far as we have been able to ascertain has never been followed on this point.

Our construction is strengthened by the fact that it is to be presumed that this testatrix intended to give to her husband something which should be of substantial value to him, which the devise of the Detroit street property *for life only* would not have been, or, if it would have been of any value, it would have been very little. The nature of the property is such that the natural thing to do with it is something other than one would do who has but a life estate in it.

The other items which need to be considered are the third item of the original will, and the first and second items of the codicil.

By the first item of the original will a bequest is made to John S. Merry of two thousand dollars.

The first item of the codicil reads:

"I give and bequeath to my beloved husband so much of my personal property as he may desire to use absolutely in addition to the provision made for him in item 2d of my said will."

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The second item of the codicil reads:

"I reduce the amount of the legacy given in item 3rd of my said will to John S. Merry from two thousand to one thousand dollars."

This second item of the codicil has the effect of making the bequest to John S. Merry the same as though the third item of the original will gave to him one thousand dollars, and the will is to be taken as a whole as though the third item so read. This being true, the rights of John S. Merry are to be treated as though the sum to which he is entitled were fixed in the third item of the original will at one thousand dollars. It follows that this sum of one thousand dollars is to be paid as any other bequest would be paid, which is, out of the personal property.

All general legacies are to be satisfied out of personal property before a resort can be had to real estate, unless otherwise directed by the will.

It will not be contended that the surviving husband is entitled either to the entire personal property or to the use of the entire personal property, in preference to the payment of the debts, so that resort should be had to the real estate for the payment of such debts; and the rule as to legacies is the same as the rule as to the payment of debts and expenses; that is, that unless some other property is designated as that out of which debts and legacies are to be paid, they must be paid from the personal property. See Raff's Guide (6th Ed.), page 153.

Suppose this administrator were to file a petition either in the probate court or the court of common pleas for the sale of real estate to pay the legacy to Merry, and it should appear from such petition that there was abundance of personal property with which to pay such legacy, it could hardly be contended that the court would be authorized to order a sale of the real estate.

It will be the order of the court, therefore, that this legacy be paid by the administrator out of the money remaining in his hands.

We think it clear as to the first item of the codicil, that it was the intention of the testatrix that her surviving husband should

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have the use of all her personal property *after* the payment of the debts, costs and expenses and the legacy to John S. Merry during the period of his natural life, and that he should have the right, not only to the income of this personal property, but to consume of the principal so much as should be necessary for his reasonable and comfortable support, considering his circumstances and condition in life, and the order will be made accordingly.

*Gus. Schmidt and J. S. Grannis*, for plaintiff.

*Johnson & Hackney*, for defendants.

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#### PARTIAL ASSIGNMENTS.

[Circuit Court of Licking County.]

JAMES W. OWENS, TRUSTEE, ET AL V. WALDO TAYLOR, ASSIGNEE.\*

Decided, October Term, 1899.

*Assignment for the Benefit of Creditors—Deed Covers Specific and Scheduled Property—Executed Prior to Amendment of Section 6343—Chose in Action Not Included in the Deed—Subsequently Reduced to Judgment in Favor of the Assignor—Then Transferred to One Not a Creditor.*

1. An assignment for the benefit of creditors of specific real estate and scheduled securities, executed prior to the amendment of Section 6343, and without any intention to prefer one creditor over another, does not convey title to the assignee of property not included in the deed.
2. A chose in action, which did not pass to the assignee, but subsequent to the assignment was reduced to judgment in favor of the assignor, is not affected by the assignment, and having been transferred by the assignor can not afterward be recovered by the assignee, though the transfer was to one not a creditor.

VOORHEES, J.; ADAMS, J., and DOUGLASS, J., concur.

The case is in this court on appeal, and is a controversy arising between Waldo Taylor, assignee of William Shields, and Margaret J. Shields and Lucius B. Wing.

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\* Affirmed by the Supreme Court without report, April 16, 1901 (64 Ohio State, 577).

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The contention grows out of a deed of assignment made by William Shields to Alonzo P. Taylor on November 23, 1878, and by Alonzo P. Taylor and William Shields to John H. and Benjamin Franklin, on December 4, 1878. In these deeds of assignment the property is described as all the lands and tenements, with their appurtenances, including all city and town lots, situated in the county of Licking; also, the real estate owned by Shields in the city of Columbus, Ohio, particularly described; also, 1,130 shares of the capital stock of the Newark Coal Company, which was hypothecated to different parties as collateral security; also, 200 shares of the capital stock of the Licking Iron Company, which was hypothecated as collateral security to Nicholas Duper & Company, of Boston, excepting and reserving from the deed the homestead rights.

Alonzo P. Taylor, on December 3, 1878, resigned said trust, and the probate court appointed John H. Franklin and Benjamin Franklin trustees instead of said Taylor; and Taylor and Shields, by deed of that date, granted, sold and conveyed to the Franklins all the lands, tenements, and all the right and title in said Taylor vested by virtue of said deed, as expressed and described therein, reference being had to said deed for a more particular description of the property.

So it will be observed that the Franklins, as trustees, got no more property, nor any different property, than what was originally transferred to Alonzo P. Taylor, in trust for Shields.

The instrument of writing, under which Margaret J. Shields and Lucius B. Wing claim the fund in controversy, was executed March 9, 1890. After the assignment Charles W. Snider took from William Shields an assignment of the claim involved in this action.

The date of the assignment was sometime after March 22, 1886. This assignment was for the benefit of Snider and was to secure him for \$427.64, with eight per cent. interest from March 9, 1890. On that day he agreed to pay over to Shields all the money other than the \$427.64 and interest realized from the judgment in favor of Gibson Atherton, trustee, against the Newark, Somerset & Straitsville Railroad Company, in which Shields was entitled to a distributive share. On the same day William

Shields assigned this money to Charles R. Shields, who, on July 25, 1893, assigned it, one-half to Margaret J. Shields and one-half to Lucius B. Wing.

The question we are called upon to determine in this case is: Does the deed of assignment originally to Alonzo P. Taylor, carry with it this chose in action which is now in controversy, and claimed by the defendant, Waldo Taylor, assignee, as being assets which were assigned originally to the assignee Alonzo P. Taylor, who was succeeded by the Franklins, and, by virtue of that assignment, it passed in trust from William Shields, and therefore William Shields' later assignment could have no effect upon the trust fund?

That is the only controversy now before us for determination; and it is the single question, whether or not the deed of assignment in this case is broad enough to carry and cover all the property then owned by Shields.

Attention has been directed to Section 6343, Revised Statutes, as amended April 26, 1898 (93 O. L. 290), and it is contended by counsel for defendant that under the section as amended, the property in controversy is to be controlled and the rights of the parties thereto are to be determined by the statute as amended.

Section 6343, Revised Statutes, before it was amended was as follows (56 O. L., 231, Section 16).

“All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims; and the trusts arising under the same shall be administered in conformity with the provisions of this act.”

It will be observed that an assignment to come within the provisions of the statute must be made with intent to prefer one or more creditors of the assignor. This was not the expressed intention, at least, of this deed of assignment made by William Shields to Alonzo P. Taylor. There was no purpose, so far as the deed of assignment was concerned, indicating that the intention was to prefer any special or particular creditor. It was for the creditors generally, so far as the property therein assigned was concerned.



The amendment is somewhat broader. As amended (93 O. L., 290), it reads as follows:

“Every sale, conveyance, transfer, mortgage or assignment, whether made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them, and every act or device done or resorted to by him or them, in contemplation of insolvency, or with a design to prefer one or more creditors to the exclusion in whole or in part of others, and every sale, conveyance, transfer, mortgage, or assignment made, or judgment suffered by a debtor or debtors, or procured by him or them to be made, in any manner, with intent to hinder, delay or defraud creditors, shall be declared void as to creditors of such debtor or debtors, at the suit of any creditor or creditors, as hereinafter provided, and shall operate as an assignment and transfer of all property and effects of such debtor or debtors, and shall inure to the equal benefit of all creditors of such debtor or debtors in proportion to the amount of their respective demands,” etc.

The section as amended is broader and would seem to cover all the property of the debtor. But can it be made applicable to this case? If the statute is broad enough to cover such a case as this, yet it could not affect rights of these parties, because this amendment was passed long after the accruing of the rights of the parties in this action. It could not affect any vested rights of the parties, and the question must be determined as the law was under Section 6343, Revised Statutes, before this amendment; and it is very clear that it could not reach or control this case.

The question then is, whether, under the general law of assignments, regardless of the statute, this deed of assignment is broad enough to cover this property which is not specifically named in the deed of assignment.

This deed of assignment does not transfer to the assignee *all* of the property of the assignor. There is no such comprehensive language in the deed of trust, but it is limited to specific real estate named in the deed and also specific personal property designated in the same instrument. There are no terms of the deed of assignment broad enough to reach all of the property that Shields owned at that time. What is the effect of this? Can this deed be construed as including property not described in the deed when it has specifically named some of the property?

In Burrill on Assignments, at page 142, the author says:

“It is a leading rule in the construction of assignments by debtors, that no more property will pass to the assignee than is embraced in the terms of the instrument; and, even where all the debtor's property is assigned in terms, if there be subsequent words of description, or a reference to a schedule, as setting it forth particularly, the contents of such clause or schedule will operate to limit the general clause of the transfer, and nothing will pass that is not set forth or specified.” Burrill on Assignments (6th Ed.), Sec. 286, p. 386; also Section 100 on page 142, and note 4 and authorities there cited.

In this case there is a clear setting forth of the property specifically, which was intended to be assigned to Taylor. It designates the real estate, and describes it. It specifically names and schedulizes the personal property which was intended to be transferred.

Burrill on Assignments (6th Ed.), Sec. 119, at page 157, in note 2 says:

“If an assignment in trust does not, on its face, purport to be of all the assignor's property, it will be treated as a partial assignment.”

A partial assignment, of course, then would be of the particular property described in the instrument.

Burrill on Assignments (6th Ed.), Sec. 119, at p. 157, n. 3, says:

“An assignment which, on its face, purports to convey all the assignor's property, when in fact he has other property not disclosed in the assignment, is void as against creditors; but if it does not so purport, it is valid, notwithstanding property may remain in the hands of the assignor unassigned. *Pearce v. Jackson*, 2 R. I., 35.”

This deed of assignment does not purport to convey and transfer all of the property from the assignor. In 1 Am. & Eng. Enc. Law (1st Ed.), 852, 853; also 3 Am. & Eng. Enc. Law (2d Ed.) 36, the author says:

“A general assignment of all the debtor's property will pass to the assignee everything which is by its nature assignable,

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except property specially exempted by law, or excepted by the terms of the deed or the schedule annexed, where the law allowed an exception.

“Only such property will pass, however, as is embraced in the terms of the instrument, and the effects of an assignment purporting to be general will be modified by descriptive clauses, or a schedule, which operate to limit the property assigned to that described in them.”

We think this deed of assignment, designating as it does this specific property assigned to Taylor, did not cover this chose in action which was afterwards passed into a judgment in favor of the assignor; and, it being his property, it would be subject, of course, to the action of general creditors. But there are no general creditors contending for it, so far as the question is now presented for our consideration. It was, then, his property, unaffected by the deed of assignment. It was property that might be transferred or assigned; and, having been assigned by him to these claimants, we think they are entitled to that fund, so far as the assignee, Waldo Taylor, is concerned. He could get nothing by virtue of the deed of assignment, or by virtue of his office, excepting the property which was assigned originally to Alonzo P. Taylor, because Alonzo P. Taylor's rights fixed those of the trustees, Franklin, and also fixed the rights of the assignee, Waldo Taylor, defendant herein.

That being so, the answer and cross-petition of Waldo Taylor, assignee, will be dismissed. There will be a decree in favor of Margaret J. Shields and Lucius B. Wing for the fund that is in the hands of Owens as trustee, awaiting the order of the court as to distribution, and this is the decree of this court.

*Kibler & Kibler*, for Lucius B. Wing and Margaret J. Shields.

*Waldo Taylor*, for Catherine Snider, executrix; also as assignee of William Shields.

**REVERSALS ON WEIGHT OF EVIDENCE.**

[Circuit Court of Mahoning County.]

PENNSYLVANIA CO. v. JOHN F. ALBURN.

Decided, October Term, 1901.

*Railways—Negligence—Proceedings in Error—Assignment of Errors—Sufficient for Purpose of Plaintiff in Error, When—Cause Reversed Twice Against Same Party on Weight of Evidence—Remedy of Defendant in Error—Negligence at a Railway Crossing Over a Country Road—Question of, Becomes One of Law, When—Sections 6716 and 6723 Relating to Transcripts, and 5306 Relating to Reversals on Weight of the Evidence.*

1. Where a transcript is sufficient to exhibit the errors complained of, it meets the requirements of Sections 6716 and 6723.
2. It is, therefore, unnecessary, where the plaintiff in error does not complain that the cause has been tried twice in the court below and the verdict set aside against the same party by the circuit court on the weight of the evidence, that he bring such facts into the record or transcript. If such facts become material parts of the record, it devolves upon the defendant in error to bring them into the record, either by cross-petition in error, or by answer setting them up as extrinsic facts why the plaintiff in error can not have the judgment reviewed on the weight of the evidence.
3. The amendment of Section 5306 (93 O. L., 217), providing that the circuit court shall not grant more than one new trial on the weight of the evidence, does not apply to a case pending prior to April 23, 1898.
4. A question of negligence becomes a matter of law when the circumstances and undisputed facts make it plain, that by the exercise of ordinary care in the use of his faculties the party injured might have avoided the injury.
5. It follows, therefore, that where one, having an unobstructed view of a railroad track for a distance of fourteen hundred feet, approaches within five feet of the track without seeing an approaching train, when the alarm whistle frightened his team, which sprang upon the track and he was struck by the train, it is the duty of the trial judge to say to the jury, as a matter of law, that the plaintiff was guilty of contributory negligence, and the verdict must be for the defendant.

VOORHEES, J.; DOUGLASS, J., and COOK, J., concur.

This case comes into this court on petition in error to review the judgment of the Common Pleas Court of Mahoning County.

Defendant in error, as next friend of Lafayette E. Alburn, a minor, brought this action to recover damages for personal injury to the minor, resulting in loss of service to the defendant in error, John F. Alburn, and for the destruction of the personal property of said defendant, in consequence of an accident which occurred on October 28, 1893.

Without going into detail of the allegations of the pleadings it will be sufficient to state that the third amended petition sets forth facts sufficient to constitute a cause of action; and the averments of the petition as to the want of care on the part of the plaintiff in error or care on the part of the son of defendant in error, are sufficient as against a demurrer.

The case has been tried twice at least, resulting at each trial in favor of the plaintiff below; and as often this court on review has set the judgment aside, on the ground that the verdict of the jury was not sustained by the evidence.

One of the contentions now is, that the circuit court, under Section 5306, Revised Statutes, as amended April 23, 1898 (93 O. L., 217), can not grant more than one new trial on the weight of the evidence. This presents the first question which is raised by the motion of defendant in error to dismiss the plaintiff's petition in error.

The ground upon which the motion is predicated, is, that the record does not contain a true and complete transcript of the proceedings in the case in the court below, in showing the various trials through which it has passed.

It is contended that the transcript should show affirmatively the number of times the case has been tried, and that if a complete record were here it would show that the case has been reviewed and reversed by this court two or more times on the weight of the evidence; and being so tried and reversed, the same court can not again review it upon the weight of the evidence; and the record not disclosing these facts, that there is a defect in the transcript, and for this reason the transcript does not meet the requirements of the law, that there should be a complete transcript of the record below filed with the petition in error.

Section 6716, Revised Statutes, provides that:

“The plaintiff in error shall file with his petition either a transcript of the final record or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of.”

And the Supreme Court in construing this section in connection with Section 6723, Revised Statutes, in *Second National Bank of Bucyrus v. Moderwell*, 59 Ohio St., 221, held:

“If a paper writing filed in this court [Supreme Court] as such transcript, etc., is not sufficient to exhibit the error complained of, no amendment thereof or addition thereto can be made after the expiration of such period of six months. Where, however, such transcript, etc., is sufficient to exhibit the error complained of, but the certificate of the clerk of the circuit court or court of common pleas authenticating such transcript is materially defective, such certificate is amendable \* \* \* after the expiration of such period.”

The plaintiff in error does not complain that this cause has been tried twice in the court below and the verdict of the jury set aside by the circuit court on the weight of the evidence; that is not the plaintiff's complaint. Nor does the plaintiff ask that the judgment be reversed because the case has been tried and set aside twice by a reviewing court on the weight of the evidence against the same party. That is not the plaintiff's contention. Therefore, it is not necessary in determining whether there is error in the record, so far as this plaintiff in error is concerned, whether or not the cause was ever tried or reviewed before by this court.

If these facts as to former trials and reversals on the weight of evidence become material parts of the record, it would devolve upon the defendant in error to bring them into the record, either by cross-petition in error or by answer setting them up as extrinsic facts, as reasons why the plaintiff in error can not have the judgment reviewed on the weight of the evidence. *Collins v. Davis*, 32 Ohio St., 76.

If the record or transcript were defective as to extrinsic facts, but not defective in showing the errors complained of by plaintiff in error, they meet the requirements of Section 6717, Revised Statutes. The record in this case does show all the error com-

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plained of by the plaintiff in error; therefore the motion to dismiss the petition in error is not well taken and is overruled.

But the court upon examination of the case, through an abundance of caution, think it best to have these facts brought into the record, namely, that this cause has been tried two or more times to a jury resulting in verdicts for plaintiff below, and upon error prosecuted to this court the judgments were reversed on the ground that the verdicts were against the weight of the evidence, and an order suggesting a diminution of record as to the former trials and the action of the reviewing court thereon will be made.

With these facts in the record an important question is presented, namely: Can the court review the verdict of the jury upon the weight of the evidence?

This depends as to whether or not the statute, Section 5306, as amended April 23, 1898 (93 O. L., 217), applies to this case. The section as amended reads as follows:

“The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case.”

Section 5306, Revised Statutes, before the amendment, was as follows:

“A new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury sustained.”

The exact date when this action was commenced the record does not show, but from the third amended petition it appears that the accident occurred on October 28, 1893. If the accident occurred on October 28, 1893, the action must have been brought before April 23, 1898. It must have been brought within four years from the accruing of the cause of action. Therefore the action must have been commenced before the passage of the amendment to Section 5306, Revised Statutes.

Is the section as amended applicable to this case?

This act, being an amendatory one, must be construed in

connection with Section 79, Revised Statutes, which reads as follows:

“Section 79. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal; and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

According to the statute in force when the cause of action in this case accrued to the plaintiff below, and at the time the action was commenced, there was no limitation on the right or power as to the number of times a reviewing court might reverse a judgment, or grant a new trial on the weight of the evidence against the same party in the same case. Therefore at the time this action was commenced there was a subsisting right to either party to have any judgment or judgments reviewed and reversed by the circuit court on the weight of the evidence, regardless of the number of trials and reversals had in the case.

There being no provision in the amendment to the section making it applicable to pending actions, etc., it follows that the statute in force when the action was commenced must govern this case, and it is to be tried and to be heard on review as if this amendment had not been enacted. *Travelers Ins. Co. v. Myers*, 59 Ohio St., 332; *Chapman Mfg. Co. v. Taylor*, 61 Ohio St., 394.

Coming now to the merits of the case, the contention of plaintiff in error is, that by reason of negligence of the plaintiff's minor son, Lafayette E. Alburn, he, the son, was responsible for the injury he sustained, and by his failure to exercise ordinary care he was responsible for the accident and the serious results that followed to himself and to the property of plaintiff. This raises two questions:

First. Do the facts as shown by the record as to the negligence of the plaintiff's son, make the question of negligence one of law?



Second. If the question of negligence on the part of plaintiff's son should be regarded as one of fact for the jury, then is the verdict against the weight of the evidence?

Considering the questions in this order:

1. It is undisputed that where this accident occurred there was nothing to obstruct the view of Lafayette E. Alburn when he approached the railroad crossing at the time the accident occurred. The topography of the country, as described in the record, puts him in such a position and afforded him such opportunity, that if he, in the exercise of ordinary care, had looked and listened for the approach of a train he would have seen this train that caused the accident.

One about to pass over a railroad crossing has no right to assume that at any hour or moment he may attempt to cross the track, that no train will approach. He may know that a regular train is behind time; he may know that the time for its approach at the point of crossing has passed, yet that alone does not justify him in assuming there will be no train crossing over the highway at the moment he may have occasion to cross it. He must at all times exercise reasonable care, such care as is required of an ordinary prudent man, and use his faculties of hearing and seeing. He is not exempt from listening merely, he must look and listen; and if he fails to do either, and by reason of his so failing, injury results to him, it is his fault and he can not recover.

The law of the case is well settled by repeated decisions by the Supreme Court of our state; and some of the cases we will refer to.

In *Cleveland, C., C. & I. Ry. Co. v. Elliott*, 28 Ohio St., 340, the court held:

"It is the duty of a traveler upon the highway, when approaching a railroad crossing, to make use of his senses to ascertain if there is a train in the vicinity; and if, when in full possession of his faculties, he fails to see or hear anything, when a prudent man, exercising his eyes and ears, with ordinary care would have discovered a train in close proximity, and he is thereby injured, he is guilty of such negligence as will prevent a recovery. And that where the undisputed

facts show that by the exercise of ordinary care a party might have avoided injury, he can not recover."

Judge Wright, on page 352, says:

"Manifestly a plaintiff can not, with his eyes open, drive squarely into a train, which he sees and knows is before him, and then claim to recover because the bell was not rung nor the whistle sounded. Equally true is it, that if he could have seen the train, and could have avoided it by the exercise of ordinary care, he can not recover. And if the circumstances were such that he could have known and ought to have known, the accident must be chargeable to his own fault. And we hold the rule to be that if, by the exercise of ordinary care, the plaintiff could have seen and avoided the train, the omission to whistle or ring alone is not such negligence on the part of the company as will justify a recovery."

The court cited with approval Wharton on Negligence, Section 382, where the author says:

"'It is the duty of a person who attempts to cross a railroad to listen for signals, to notice all signs that may be put up as warnings, and to look up and down the road. It follows, therefore, that if a traveler by looking along the road could have seen an approaching train in time to escape, it will be presumed, in case of collision, that he did not look, or looking did not heed what he saw, and in such case the road under ordinary circumstances is not liable.'

"The same author (p. 384) says: 'Where a person knowingly about to cross a railroad track may have an unobstructed view of the railroad so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, he can not, as a matter of law recover, although the railroad company may have been also negligent or have neglected to perform a statutory requirement.'"

In *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66, the court, by Wright, J., on page 72, says:

"We think the law must now be considered as well settled that the traveler approaching a crossing must be upon the lookout for danger. Ordinary care requires that he must look and listen to see if a train is in the vicinity, and if he fails in this, it is not merely evidence of negligence to be considered by the jury, it is itself such negligence as will prevent a recovery."

Also on page 73, the court says:

"The evidence is clear that Rathgeb might have seen the train at any point less than three hundred feet from the crossing until he reached it, and seen it in time to have avoided a collision. Although he says he was near-sighted, still he stated that he could have seen a train for a distance of fifty rods, and his defect of vision was not such as to vary the principle.

"Being able to see, therefore, and the opportunity of seeing being presented, his failure to discover or to be aware of the approaching cars, we think, was not only evidence of negligence, but negligence itself, and sufficient to justify a verdict against him. And in other parts of the charge the court declined to say that the positive duty of the plaintiff was to look up along the track, but left it to the jury to determine whether it was incumbent upon him to do so or not. We think such directions do not meet the requirements of the case. The rule should be laid down in such clear terms that there can be no mistake in its application. This case is really disposed of by that of *Railroad v. Elliott*, 28 Ohio St., 340. In *The Cleveland, C. & C. R. R. v. Crawford*, 24 Ohio St., 631, the first clause of the syllabus is: 'Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.' "

In the late case of *Wabash Ry. Co. v. Skiles*, 64 Ohio St., 458, the court, by Judge Davis, announcing the opinion, held that where an employe of a railway company whose duty requires him to cross a track in the yards or at his station, "will be held to the exercise of ordinary care in going from a place of safety upon or across railway tracks; and ordinary care requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a railroad track, should use them for the purpose of discovering and avoiding danger from an approaching train; and an omission to do so, without reasonable excuse therefor, is negligence which will defeat an action by such person to recover damages for an injury to which such negligence contributed. Where such an employe without looking or listening, steps upon a railway track

from a place of safety on a platform, immediately after the passing of a train, and in front of and close to a backing switch engine, so that he is immediately struck and injured by such engine, he is guilty of contributory negligence and can not recover for the injury thus received."

If a party looks and listens, and the circumstances and surroundings were such that if he had exercised these faculties he could not have discovered the threatened danger from the approaching train, then a different rule would apply, and there would be duties devolving upon the railroad company to be considered that do not arise in this case. To illustrate: If the location were such that by reason of obstruction in the way the party, even if he had exercised the caution of looking could not have seen an approaching train, then the question as to whether he listened or not would become important; and if the railroad company failed to use ordinary care in giving warning, by sounding a whistle, ringing a bell, or otherwise, such party might not be charged with negligence in attempting to cross the railroad. *Cleveland, E. & C. Ry. Co. v. Crawford*, 24 Ohio St., 631; *W. & L. E. Ry. Co. v. Suhrwiar*, 22 C. C., 560.

But suppose when such party approaches the crossing he listens, and hears no whistle, or bell, but there is a train in full view, approaching the crossing which he seeks to cross, could it be claimed that he would be exempt from using his faculty of seeing, when by looking he could have seen such train approaching, although it may not have made any noise, or given warning by a whistle or bell? We think not. *Cleveland, C., C. & I. Ry. Co. v. Elliott* and *Pennsylvania Ry. Co. v. Rathgeb*, *supra*.

Coming to a closer analysis of the facts of the case at bar, did plaintiff's son see this train approaching, or could he have seen it had he looked? He claims that when he was one hundred feet from the crossing he looked in both directions. The undisputed testimony is that at that distance from the crossing he could have seen a train coming from the west (the direction from which the train came which caused the injury), at least for a distance of fourteen hundred feet. The record shows that there was nothing to prevent his seeing the train if he had looked. Then it resolves itself into this condition of facts,

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either he did not look when he was within a hundred feet of the crossing, or, if he did look, he must have seen the train coming. But not resting the case at this point, on the theory that different minds might possibly differ as to it being negligence *per se* or a question of law, on the ground or possibility, that at one hundred feet from the crossing, the train running at the speed it is claimed this train was running, may not have come within the space of fourteen hundred feet when he looked and listened as claimed at one hundred feet, the record shows that he moved on towards the crossing, his horses in a walk, and when he reached within twenty feet of the crossing he claimed that at that point he again looked and listened. Testing the case now under such conditions how does it stand. The situation of the country at this crossing, from the undisputed facts and admissions of the plaintiff's said son, are that he was familiar with this crossing. He knew its location, knew all about it, and with the opportunities he had of seeing, if he had looked, according to the undisputed testimony, he could have seen beyond the point of fourteen hundred feet when he was within twenty feet of the crossing. But he leaves this place and moves on towards the crossing. The excuse he offers for leaving this place of safety twenty feet from the crossing, is that he looked and listened and that he heard neither whistle nor bell. But if he looked he must have seen the train. He could not, from the testimony, when he was within twenty feet of the crossing, have looked without having seen the approaching train. At this distance he was in a place of safety, and if he moved on seeing the train coming, it was immaterial as to the speed of the train, or whether it whistles or not, because he is bound to look and listen, and if either faculty gives him warning, he must heed it. A man would be reckless to drive upon a railroad crossing, although he were deaf, if he saw an approaching train within close proximity. Therefore this party, from the circumstances and facts disclosed in the record, if he looked when he was within twenty feet of that crossing, he must have seen the approaching train; if he did not look, he was equally negligent. When he reached the point twenty feet from the crossing and the train was approaching within his view, as appears in the

record, he would then he reckless if he undertook to cross; and from these facts and circumstances we must find that he either looked and disregarded what he saw, or that he did not look, and, therefore, was careless and negligent in approaching, and as a matter of law can not recover.

But the plaintiff's son claims that he moved on until he got within five feet of the crossing before he discovered the train, and his attention was first called to it by the sounding of the alarm whistle, and his team became unmanageable and sprang upon the track and he was injured. This would not relieve him from the charge of negligence.

Without spending more time upon the first branch of the proposition, the one that we think raises the vital question in this case, namely, that under the circumstances disclosed in the record it was the duty of the court to have said to the jury, as a matter of law, that upon the undisputed facts and according to plaintiff's own version of the transaction, Lafayette E. Alburn was guilty of negligence *per se*, and that it is not a question of fact where different minds might differ as to whether he was negligent or not, we hold, as a question of law, that the court below should have instructed the jury as requested in the third instruction, by saying to the jury, as a matter of law, that upon the undisputed facts in the case said Lafayette E. Alburn was guilty of contributory negligence, and that the verdict must be for the defendant. *Cleveland, C., C. & I. Ry. Co. v. Elliott; Pennsylvania Ry. Co. v. Rathgeb; Wabash Co. v. Skiles, supra.*

2. From the view taken by the court, that Section 5306, Revised Statutes as amended, does not affect this case, it is still open for consideration by a reviewing court upon the weight of the evidence.

If the case, as presented in the record, rested solely upon the weight of the evidence, notwithstanding the rule that a reviewing court should not reverse simply because it differs from the jury upon the facts, yet where there is substantially no evidence to support the verdict, or the verdict is manifestly against the weight of the evidence, in such case it is the duty of the reviewing court to set aside the verdict and judgment based

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thereon. And this is the conclusion of the court, upon a review of the evidence, that the verdict is against the weight of the evidence.

Therefore, this cause is reversed and the judgment set aside, because it is contrary to law, and the verdict of the jury is against the manifest weight of the evidence.

*Carey & Mullins*, for plaintiff in error.

*James Kennedy*, for defendant in error.

### SPEED OF ELECTRIC CARS.

[Circuit Court of Hamilton County.]

CINCINNATI STREET RAILWAY CO. v. MARY A. LEWIS.

Decided, December 18, 1901.

*Electric Cars—Speed of, Within Municipal Limits—Ordinance Regulating Speed of Horse Cars in 1879—Not Applicable to Electric Cars of the Present Day—Rule of Reasonable Safety Applied.*

1. An ordinance of 1879, providing that "no cars shall be drawn at a greater speed than six miles an hour," having been passed in the days of horse and mule cars, applied to practically a different subject from modern electric locomotion, and is not regulative of the speed of electric cars of the present day.
2. In the absence of a regulative ordinance, the rule as to speed of electric cars is that of reasonable safety in view of all the facts and surrounding conditions.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

The principal question raised in this case is what speed ordinance, if any, is applicable to the operation of the electric cars of the defendant company upon the streets of the city of Cincinnati. So far as the record shows three enactments by the legislative board of the city are submitted for consideration, and it is stated that these three ordinances comprise all the legislation upon the subject. They are:

1. The ordinance of February 7, 1879, which provides:

"No cars shall be drawn at a greater speed than six miles an hour." Coppock & Hertenstein's Ordinances, p. 538, Section 18, Par. 1.

## 2. The ordinance of October 25, 1889, which is:

"Sec. 2. That the schedule time for operating cars over said routes 5 and 7, and over all portions of said company's other street railway routes over which any kind of motors or means of rapid transit are authorized to be used, shall not exceed ten miles an hour, and Article I, Section 18 of the general street railway ordinance, passed February 7, 1879, or any provision of any other ordinance relative to the speed at which each car shall be operated, shall not be applicable to such routes." Henderson's Ordinances, 1887-1895, p. 83.

## 3. The ordinance of October 14, 1892:

"Therefore, be it ordained by the board of legislation of the city of Cincinnati, that said ordinance, passed October 25, 1889, entitled 'An ordinance, No. 4286, to provide for the extension of route No. 7 of street passenger railroads, and for the construction of an electric system of motive power along said route No. 7 and upon a portion of route No. 5, and to fix rates of speed upon certain routes,' be and the same is hereby repealed; and all rights, privileges and franchises granted to the Cincinnati Street Railway Company under and by virtue of said ordinance, be and the same are hereby forfeited and held for naught." Henderson's Ordinances, 1887-1895, p. 83.

The court below held that the ordinance of 1889, providing for a schedule rate not to exceed ten miles an hour, was void, as being unreasonable, and charged the jury that the ordinance of 1879, reading that "no cars shall be drawn at a greater speed than six miles an hour," obtained and was controlling upon the company.

We are of opinion that this ruling of the court below was error. The ordinance of 1879, this court feels, must be construed in view of existing facts and conditions. We can not divest ourselves of the knowledge that in 1879 the cars in the streets of the city of Cincinnati were drawn by horses and mules, and the use of electric motive power for the purpose of propelling cars through the streets had not then been thought of as practicable.

The language of the ordinance, the use of the word "*drawn*," would point to the use of horses and mules, and indicate that



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electric rapid transit as we know it to-day' was not in contemplation.

We are of opinion that the ordinance of 1879 is practically on a different subject matter—that modern electric locomotion is a different thing from that regulated by that ordinance. This brings us to the consideration of the ordinance of 1889.

We are of opinion that Section 2 of the ordinance of October 25, 1889, to the extent that it regulates the speed of electric cars, was repealed by the ordinance of October 14, 1892. Having come to this conclusion, we do not pass upon the question of reasonableness which engaged the attention of the court below.

It is contended by the street railway company that the ordinance of 1892 only partially repeals the ordinance of 1889. It is true that the 1892 ordinance speaks of fixing the rates upon certain routes, and does not in express words mention that part of the ordinance of 1889, which says "and over all portion of said company's other railway routes upon which any kinds of motive or street railway transit are authorized to be used," or to the part which provides, "and Article I of Section 18 of the general street railroad ordinance, passed February 7, 1879, or any provision of any other ordinance relative to the speed at which each car shall be operated, shall not be applicable to such routes." The quotation in the ordinance of 1892 is of the caption of the ordinance of 1889, and is used for the purpose of reference to everything upon the subject of speed contained in that ordinance.

This leaves the city, so far as our attention has been called to the ordinances upon the subject, without an ordinance as to the rate of speed at which electric cars can be operated upon the streets of the city of Cincinnati. This is somewhat startling, but we reach the conclusion without misgiving or hesitancy because such conclusion works little or no substantial change in the law as it would be under the ordinance of 1899 as construed in the Gannon case.

In the Gannon case [not reported] the existence or validity of the 1889 ordinance was not questioned, but it was treated

as a valid and subsisting ordinance. In that case the trial court charged as follows:

“In regard to speed, the ordinance provides ‘that the schedule time for operating cars over said routes 5 and 7 and over all portions of said company’s other street railway routes over which any kind of motors or means of rapid transit are authorized to be used, shall not exceed ten miles an hour,’ etc. I charge you that this ordinance fixing the rate of speed at which defendant’s car might be operated at the time in issue here, does not mean that the car shall not be operated at any time or place at a speed exceeding ten miles an hour, but its true construction is that in planning the movements and operation of its cars the defendant company shall allow sufficient time for a car to make its round trip by running at an average speed not to exceed ten miles per hour.

“It is permissible under this ordinance for a car which has been obstructed in the more crowded and populous parts of the city and has been compelled to run at a very slow speed, to make up its time by running at a rate to exceed ten miles per hour on parts of its route which are unfrequented by vehicles and pedestrians, provided it can do so with reasonable safety. This leaves the rate of speed at which the car may travel to be determined by you, in view of all the surrounding facts and circumstances, and of the degree of care to be observed by those operating it. Manifestly a car may be operated at very much greater speed through Eden Park than on Fourth street, between Main and Vine. What would be a lawful and reasonable speed for the car upon which James Gannon rode upon the night of his death is for you, gentlemen of the jury, to determine in view of all the facts and circumstances of the case. And in this determination you may consider the location in the city, the time of day or night, whether or not it was between intersecting streets, the presence or absence of persons and vehicles in the street along the tracks, the load which the car was carrying, and everything which, in your judgment, would influence a reasonable man in exercising the degree of care incumbent upon the defendant company.”

That charge received the approval of this court and the Supreme Court.

The law, with or without the 1889 ordinance, is that of “reasonable safety, in view of all the facts and surrounding conditions.” If it is deemed wise and necessary that there be an

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ordinance on the subject, one should be properly and regularly passed.

Further, there were a number of special charges requested by the defendant and refused by the court. We are of opinion that the court refused the first special charge properly.

We think that the court should have given the second charge.

We think the third special charge would be better if the word "when" were changed to "if;" the word "when," perhaps not necessarily, but in its reading, seems to imply a little finding of fact by the court.

The fourth and fifth were properly refused; the sixth ought to have been given; so should the seventh and eighth; the ninth was properly refused.

For these reasons the judgment of the court below will be reversed.

*Paxton & Warrington and Kittredge & Wilby*, for plaintiff in error.

*Prescott Smith*, contra.

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#### ADMINISTRATOR'S BOND.

[Circuit Court of Cuyahoga County.]

ANNA L. MURPHY V. MARGARET DORSEY, ADMINISTRATRIX.

Decided, December 16, 1901.

*Sureties—Liability of, on Bond of Administrator—For Moneys Received on Policy of Insurance—For the Benefit of Designated Beneficiaries.*

Sureties on the bond of an administrator are not liable for the proceeds of a policy of insurance on the life of the decedent, paid to the administrator "as trustee for the beneficiaries entitled thereto."

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This is a proceeding in error to the court of common pleas of this county.

The parties, plaintiff and defendants here, are respectively as they were in the court of common pleas. The only judgment rendered in that court, as appears by the transcript, was one

in favor of the defendant, Margaret Dorsey, administratrix, etc., and this was entered upon a verdict returned in her favor by direction of the court.

The suit was upon a bond given by the defendant, Kate Murphy, as administratrix of the estate of Dennis E. Murphy, deceased, which was executed by the defendants, James Reilly and one Rosa Ward, as sureties. Since the execution of said bond, said Rosa Ward has deceased, and the defendant Margaret Dorsey is the duly appointed and qualified administratrix *de bonis non* with the will annexed of the estate of said last named decedent in which representative capacity she was made defendant in this original action.

The facts in the case are, that at the time of the death of said Dennis E. Murphy he was a member of a mutual benefit society, which entitled such person as he should designate to the payment of a sum of money by such association, at his death. By his last will he designated this plaintiff as the beneficiary of one-half the amount so to be paid. The entire amount to be paid was \$1,485; so that the sum to which this plaintiff was entitled was \$742.50.

This last amount was paid to said Kate Murphy by said association while she was engaged in the execution of her trust as administratrix as aforesaid, and she receipted therefor as such administratrix, and has not paid the same or any part thereof to the plaintiff. Thereafter plaintiff brought suit in the court of common pleas of this county against said Kate Murphy, both in her individual capacity and as such administratrix, for the money so received by her from said association; in this action of plaintiff recovered a judgment against said Kate Murphy in both capacities in which she was sued; that judgment is still in full force.

The petition in this action is based upon said judgment, the same having been first duly presented to the defendant, Margaret Dorsey, as administratrix as aforesaid, of the estate of Rosa Ward, deceased, and having been disallowed by her. It is averred by the plaintiff in the petition upon which the judgment hereinbefore mentioned was obtained, that the money obtained by Kate Murphy from the association, "is in her posses-

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sion as such administratrix, but not as assets of said estate, but only as trustee for the beneficiaries entitled thereto."

In the view taken by the court, of the law applicable to the case, no other facts need be considered, and only two questions of law decided.

First. Are the sureties upon the bond given by Kate Murphy as administratrix liable for money in her hands for which she receipted as administratrix, but which was not assets of the estate being administered upon, but held by her "only as trustee for the beneficiaries entitled thereto?"

Second. Are such sureties so *bound* by the judgment hereinbefore mentioned that they may not defend here, upon the ground that the obligation assumed by them in the bond did not include any liability for money coming into the hands of the administratrix as this money did?

The condition of the bond executed by these sureties so far as it need be considered here, is in these words:

"The condition of the above obligation is such, that if the above named Kate Murphy, administratrix with the will annexed of all and singular the goods, chattels, rights and credits which were of Dennis E. Murphy, deceased, \* \* \* shall administer, according to law, all the moneys, goods, chattels, rights and credits of the deceased, and the proceeds of all the real estate that may be sold for the payment of decedent's debts, which shall at any time come to her possession, or the possession of any other person for her.

"Third. Shall render, upon oath, a just and true account of her administration within eighteen months, and at other times when required by the court or the law. \* \* \*

"Fourth. Shall pay any balance remaining in her hands upon the settlement of her accounts to such persons as said court or the law shall direct, \* \* \* then this obligation shall be void, otherwise it shall remain in full force and value in law."

Unless the administratrix failed to comply with one or more of these conditions, the obligation was null and void. She was bound to administer according to law, all the property of the deceased, which came to her hands or any other person for her, all such property would be assets of the estate. She was bound to render upon oath a just and true account of her administration, that is, of what was done by her with these assets.

She was bound to pay over to the proper parties any balance of the avails of such assets remaining in her hands upon the settlement of her accounts.

Unless the administratrix has failed in some one of the above-named things which she was bound to do, it is difficult to see how any action could originally have been maintained upon this bond.

The money which she received from the benefit society was not assets of the decedent's estate; this is averred in distinct terms in the petition upon which the judgment sued upon in this action was obtained.

It follows that no judgment rendered in that action could have made this money assets of such estate; and it further follows that unless the sureties upon the bond of the administratrix can be held for the wrong-doing of the administratrix in connection with some property *not* assets of the estate, they can not be held in this action.

Looking to the language of the bond, we find nothing for which the sureties became responsible except for the proper administration and distribution of the decedent's estate, and if these sureties may rely upon the general principle that the obligation of the surety is not to be extended beyond the plain terms of his undertaking, then these sureties can not be held.

In *Gregg v. Currier*, 36 N. H., 200, it is said:

"The rule applicable to official bonds in general, that the sureties are liable only for the official acts and defaults of the principal and for funds in his hands in his official capacity, applies also to administrators' and executors' bonds."

In *Wattles v. Hyde*, 9 Conn., 10, it is held:

"So the principal himself is liable on his bond only for official acts and defaults. Hence as respects any remedy for his misconduct by a proceeding on his bond, his liability and that of his sureties are co-extensive."

In *Hobbs v. Middleton*, 1 J. J. Marsh, 178, the same proposition is asserted.

In a note in *Commonwealth v. Stub*, 51 Am. Dec., 515, 519, this language is used:

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"This is, no doubt, the general rule, but it does not follow that there can always be a recovery on the bond against the sureties whenever there can be a recovery against the principal, for although as respects the act or default which constitutes the cause of action, their liability may be the same, he may, in certain cases, be estopped by some act or admission from making a defense which is open to them."

*Givens, Matter of*, 34 N. J. Eq., 191. In this case an administrator was ordered to sell certain real estate of the deceased. He did sell, in addition to that ordered to be sold, another tract of land; and it was held that his sureties were not liable for the avails of the sale of the parcel not ordered to be sold. This language is used in the opinion at page 192:

"It is clear that the administrator and his sureties are bound to answer only for the administration of the proceeds of the sale of land sold by the former pursuant to the order of the orphans' court."

In *Pace v. Pace*, 19 Fla., 438, paragraph 6 of the syllabus reads:

"The sureties upon the bond of an administrator who has collected money neither assets of the estate nor subject to distribution by him, and to which as the legal representative of the decedent he was not entitled, are not liable for any appropriation or use of the same by the administrator for his personal benefit."

In this case, money was paid to an administrator upon a life insurance policy held by the decedent.

Under a statute of the state of Florida the money to be paid upon this policy was not liable for the payment of the debts of the decedent. And the court say, in reference to the policy, that—

"Under this statute and under this policy, unquestionably upon the death of the assured, no creditors had a right to participate in the proceeds of this policy. It enured exclusively to the benefit of his child surviving him, the plaintiff in this case, and even if the contract was with the assured, and his executors, administrators and assigns (as to which the bill is silent), the administrator would not hold it as general assets in his hands liable to the payment of debts, or to distribution according to

the laws of the domicile of the intestate. He would hold it as trustee, coupled with the single duty of payment."

On page 453, the court further say:

"With this construction of the policy, the necessary result is that upon the death of the assured, the child became entitled to its proceeds, had title thereto, and that the administrator, the legal representative, had no title, and was in no way entitled to the possession or control thereof.

"The infant, therefore, does not here claim as heir or distributee. His claim is like that which a stranger would make if he were the beneficiary. The necessary result of this is, that the sureties of the administrator are not responsible for the management of this fund for Pace. The fact that he did, as administrator, receipt for the property of the child, can not bind his sureties."

From these and many other authorities we hold that the sureties upon the bond of Kate Murphy, as the administratrix of the estate of Dennis E. Murphy, were not liable for the moneys received from the benefit association.

As to the other question, of whether by reason of the judgment obtained against Kate Murphy as administratrix, these sureties are estopped, we hold in the negative.

It is true that, in the absence of fraud, the settlement made by the probate court of administrators, guardians and the like, binds the sureties; yet they are so bound because those accounts show the balance of assets remaining in the hands of the trustee for distribution; but, in this case, the judgment itself, which is the foundation of the present action, was upon a petition showing that the money was not assets of the decedent's estate. The judgment, therefore, as has already been said, in that case, was not a finding that this money was assets. There has been then, no finding that there were assets in the hands of Kate Murphy as such administratrix which she has failed to pay over. That being true, there is no breach of the condition of her bond.

The judgment of the court of common pleas is affirmed.

*White, Johnson, McCaslin & Cannon*, for plaintiff in error.

*F. A. Beecher and J. P. Dawley*, for defendants in error.



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**GARNISHMENT OF A DEBT OWING BY A FOREIGN CORPORATION.**

[Circuit Court of Cuyahoga County.]

RITER-CONLEY MANUFACTURING CO. v. JOHN MZIK.

Decided, November 11, 1901.

*Attachment and Garnishment—Where the Garnishee is a Foreign Corporation—And the Property Attached is a Debt—Owing to a Non-Resident Defendant—Situe of the Debt—Service Upon Agent of Corporation.*

1. Where a foreign corporation is prosecuting business in Ohio, and is capable of suing and being sued in the courts of this state, it is subject to garnishment in a case wherein an attachment may rightfully issue.
2. And the garnishment is not defeated by the fact that the property reached by the garnishee process is a debt owing by the garnishee to a non-resident.
3. Service upon a district manager constitutes a legal service, where it appears that the general manager, upon whom service was authorized, occupied the same office, and had knowledge of the service before the filing of the motion for the discharge of the attachment.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Heard on error.

The defendant in error commenced an action in the court of common pleas against the plaintiff in error to recover compensation for injuries which he alleges were caused by the negligence of the plaintiff in error while in its employment. At the commencement of the action he procured an attachment to issue and garnishee process to be served upon the American Steel & Wire Company. The plaintiff in error is a Pennsylvania corporation having its domicile in that state. The garnishee, The American Wire & Steel Company, is a New Jersey corporation and domiciled in that state, but, by compliance with the laws of Ohio relating to foreign corporations, its business is prosecuted, in part, in this state. It has also appointed and keeps an agent in Ohio (see Sections 148c and 5046, Revised Statutes, upon

whom service of process in all legal proceedings can be made. The defendant in error is a resident of Ohio.

Before the garnishee had answered, a bond for the release of the property was given in accordance with the terms of Section 5545, Revised Statutes. That bond was not signed by the plaintiff in error.

It appears that the only property reached by the garnishee process, if any, was a debt owing by the garnishee to the plaintiff in error. Subsequently to the giving of the bond, a motion was made to discharge from the attachment the credit owing by the American Steel & Wire Company to the plaintiff in error. That motion reads:

“The defendant, The Riter-Conley Manufacturing Company, appears here for the purpose of this motion only and moves the court to discharge from the attachment in this case the credit owing to it by The American Steel & Wire Company sought to be attached herein, on the ground that this defendant is a non-resident of Ohio and The American Steel & Wire Company is likewise a non-resident of Ohio, and the credit sought to be attached beyond the jurisdiction of the court.”

At the time the defendant in error sustained the injuries of which he complains, the plaintiff in error was constructing for The American Steel & Wire Company under contract a blast furnace in the city of Cleveland.

The motion to discharge the attached property was overruled, and error proceedings are now prosecuted to reverse that order of the court.

In support of the petition in error, it is argued that the courts of this state have no jurisdiction of property of any kind not within the state, and since the garnishee and its creditor both reside without the state the *situs* of the debt is without the state and not subject to the jurisdiction of the court in which the principal action is pending, and, therefore, the motion should have been sustained, and the court erred in deciding otherwise.

In proceedings by garnishment for the attachment of a debt, it may be conceded that a corporation non-resident of this state, exercising no corporate powers or franchise within the state

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(and entirely non-resident) is not liable to garnishee process in an action by a resident of this state against a foreign corporation. *Reimers v. Seatco Mfg. Co.*, 70 Fed. Rep., 573 (37 U. S. App., 426); *Louisville R. R. Co. v. Dooley*, 78 Ala., 527; *The Alabama R. R. Co. v. Chumley*, 9 So. Rep., 286 (92 Ala., 317); *Everett v. Insurance Co.*, 4 Colo., 509; *National Bank v. Furtick*, 2 Mar. (Del.), 35; *Associated Press v. United Press*, 29 S. E. Rep., 869 (104 Ga., 51); *Illinois Central Ry. Co. v. Smith*, 12 So. Rep., 461 (70 Miss., 344; 19 L. R. A., 577; 35 Am. St. Rep., 651); *American Central Ins. Co. v. Hettler*, 56 N. W. Rep., 711 (37 Neb., 849); *Douglas v. Insurance Co.*, 33 N. E. Rep., 938 (138 N. Y., 209; 20 L. R. A., 119; 34 Am. St. Rep., 448); *Towle v. Wilder*, 57 Ver., 622; *Morawetz v. Sun Ins. Office*, 71 N. W. Rep., 109 (96 Wis., 175; 65 Am. St. Rep., 43).

But if, as in this case, the garnishee is a foreign corporation, but by virtue of the statute of this state and by a compliance therewith is prosecuting its business within the state and is capable of suing and being sued in the courts of the state, it is subject to garnishee process in any action against its creditor in which an attachment may rightfully issue. See Sections 148c, 5046 and 5521, Revised Statutes; *Lancashire Ins. Co. v. Corbetts*, 46 N. E. Rep., 631 (165 Ill., 592; 36 L. R. A., 640; 56 Am. St. Rep., 275; *German Bank v. American Fire Ins. Co.*, 50 N. W. Rep., 53 (83 Iowa, 491; 32 Am. St. Rep., 316); *Nat. Fire Ins. Co. v. Chambers*, 32 Atl. Rep., 663 (53 N. J. Eq., 468); *Burlington Ry. Co. v. Thompson*, 1 Pac. Rep., 622 (31 Kas., 180; 47 Am. Rep., 497); *Railway Co. v. Barnhill*, 19 S. W. Rep., 21 (91 Tenn., 395; 30 Am. St. Rep., 889); *Cross v. Brown*, 33 Atl. Rep., 147 (19 R. I., 220); *Neufelder v. Insurance Co.*, 33 Pac. Rep., 870 (6 Wash., 336; 6 Am. St. Rep., 166; 22 L. R. A., 287).

The cases announcing a contrary doctrine hold that the *situs* of the debt is with the creditor and with his domicile, and if the creditor be a non-resident, the debt is not within the jurisdiction of the court.

This may be the rule where specific tangible property is sought by proceedings in garnishment, but does not apply by proceedings in garnishment for the attachment of a debt. The

law, we believe, to be correctly stated in 6 Thompson's Corporations, Section 870. Speaking of the jurisdiction to reach a debt due by one foreign corporation to another foreign corporation, he says:

"In so far as the proceeding involves a summons to the garnishee, requiring him to appear and answer, and provides for further proceedings against him upon his answer, or in default of his answer, which may result in a *judgment against him*, it is a proceeding *in personam*. Now, in so far as it is a proceeding *in personam* against the foreign corporation, no jurisdiction can be acquired unless the situation of the foreign corporation within a domestic state is such that an ordinary action *in personam* could be prosecuted against it in the domestic tribunal. It follows from these considerations that a foreign corporation which is *entirely non-resident*, is not subject to garnishment, and can not be made so, for the states have no power to extend their judicial process into other states; but if it is resident in the domestic state in such a sense as makes it amenable to the ordinary judicial process of such state, then it is amenable to process of garnishment, unless the statute governing the question is so framed as to exclude such a conclusion. There is certainly no principle of public policy or justice upon which an intention can be imputed to the Legislature to distinguish between actions brought directly against a foreign corporation for the recovery of a debt, and those in which they are indirectly brought before the court for the purpose of satisfying the demand of some third person."

In such case the garnishee can only be held to answer in the jurisdiction where proper service can be had upon him.

If, in this case, the *situs* of the debt alone governs and that is at the domicile of either the debtor or creditor, the debt is not within the jurisdiction of the court out of which the attachment issued.

That tangible property within the jurisdiction of the court, although in the custody of a non-resident corporation, may be reached in attachment and by garnishee process, is not disputed.

If The American Steel & Wire Company had under its control tangible property, it could in these proceedings be attached or reached by process of garnishment. In such case, the fact that both debtor and creditor are non-residents of the state would not prevent attachment proceedings. Instead of having in its

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custody property, The American Steel & Wire Company is indebted to the plaintiff in error.

Indebtedness is a thing of substance and of value. It can be sold and assigned, its payment enforced by the creditor in an action in any court in whose jurisdiction legal service of process can be served on the debtor.

It is not controverted that the plaintiff in error could enforce its claim against The American Steel & Wire Company in the court from which this attachment issued. Then, for what reason can not this debt as well as tangible property of the plaintiff in error be reached by attachment? The right in respect to it can be enforced by the plaintiff in error in an action at law in the tribunals of this state. He may enforce its collection, receive payment in full and take the proceeds beyond the jurisdiction of the court.

We know of no good reason for denying the defendant in error the right to reach this claim, this property, by garnishment in attachment proceedings, nor for sustaining the plea of either the plaintiff in error or the garnishee that this property is not subject to attachment in this state.

The defendant in error, on the hearing, suggested that the trial court had no jurisdiction to entertain the motion to discharge this property after the giving of the release bond.

Coming to the conclusion we do upon the other proposition in the case, it is unnecessary to pass upon this claim.

It is suggested by counsel for plaintiff that no legal service was made upon the garnishee. The return of the sheriff reads:

"I served the foregoing on The American Steel & Wire Company, garnishee, by leaving a true and certified copy thereof, and also a notice to appear and answer as such garnishee in the Court of Common Pleas of Cuyahoga County, in the form provided by law, at the office, the usual place of business of said company, with J. H. Early, assistant district manager in charge thereof."

It appears from the bill of exceptions that Albert T. DeForest was the authorized agent of the garnishee upon whom legal service could be made within the state, and he was also the general manager of the corporation. J. H. Early was his as-

sistant, and both occupied the same office at the usual place of davit of Mr. DeForest, made part of the bill of exceptions, that the notice to the garnishee came to his possession and knowledge prior to the filing of this motion, and we are, therefore, of the business of the corporation. It further appears from the aff-opinion that the motion should not be sustained upon this ground.

Our conclusion is, that there was no error in overruling the motion to discharge from the attachment the debt due from The American Steel & Wire Company to the plaintiff in error, and the judgment of the court of common pleas is affirmed.

*Gilbert & Hills and J. H. Van Derveer*, for plaintiff in error.

*Noble, Pinney & Willard and H. F. Payer*, for defendant in error.

#### WAIVER OF A RIGHT OF FORFEITURE.

[Circuit Court of Ashtabula County.]

MARY L. FIELD AND ALBERT T. FIELD V. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.\*

Decided, October 12, 1897.

*Deed—Of Land to a Railroad—With a Right of Forfeiture—Dependent Upon a Condition Subsequent—Waiver of Right—Bars a Recovery for the Land Taken as for Appropriation and Without Compensation—Section 6448.*

F and others conveyed land to a railroad company in consideration of one dollar in hand paid and on the express condition that the road be constructed within two years. After a lapse of seventeen years from the time the condition was to be performed, and after improvements had been placed upon the property which raised its value to \$600,000, suit was brought by the grantors which in its present form is for recovery of the value of this land taken as by an appropriation and without compensation being made. *Held:*

1. That the omission to take any steps for so long a period for the forfeiture of the title on the ground of failure of a condition

\* Affirmed by the Supreme Court without report (62 Ohio State, 633).

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- subsequent, constitutes a waiver of the right to insist upon forfeiture, and bars the plaintiffs from recovering the property.
2. The fact that in such a case the condition was not performed does not give to the grantors the right to maintain a suit against the grantee for recovery of compensation for the land, under the provisions of Section 6448, authorizing actions as for appropriation for land taken without compensation and not under contract in writing.

LAUBIE, J.; FRAZIER, J., and BURROWS, J., concur.

The case of Mary L. Field and Albert Field against the Lake Shore & Michigan Southern Railway Company and William K. Vanderbilt, has been submitted to us in the arguments of counsel and extensive briefs, wherein the plaintiff ask to have the judgment of the court below reversed for various claimed errors as stated in the petition in error.

The court below charged the jury that the plaintiffs could not recover in that action the value of the lands claimed as upon an appropriation, and if that direction of the court to the jury is correct, that ends all questions in this case. It is entirely immaterial what other errors may have been committed, if that was not erroneous.

Now the action was brought, according to the ninth amended petition before us, to recover the value of certain lands in this county which were deeded to the railway company or its trustees (the same thing) in 1871 by the plaintiffs, in consideration of the sum of one dollar in hand paid and upon the condition that was provided in the deed for the construction of the road within the period of two years. It was alleged that this condition has not been complied with, but that the plaintiffs have not enforced it, except as they seek to enforce it now. That is, they seek now to recover the value of the lands conveyed, because the condition was not complied with as to the building and operation of the road, and the court instructed the jury, as I have said, that the action could not be maintained.

Why might a recovery be had, as claimed by the plaintiffs? They say that they are entitled to recover because of the fact that this condition in the deed was not complied with, and that this was the condition:

“Nevertheless, the above conveyance is upon the express condition subsequent, that if the Lake Shore & Southern Michigan Railway Company shall not within two years from this date have constructed and in operation its Ashtabula and Jamestown branch railroad, having its main business line running from the east side of the harbor of Ashtabula to Jamestown, in the state of Pennsylvania, then upon the demand of the said Mary L., her heirs and assigns, the said Clark shall reconvey the above granted lands to said Mary L., her heirs and assigns.”

That the plaintiffs had in 1890 commenced an action by ejectment to recover possession of these lands and damages for their retention, and that that action is this one—this being the ninth amended petition in the case; that they abandoned the right to recover by ejectment and they now seek to recover the value of the premises, by alleging that this condition was never performed; that it is true they stood by and saw the railway company occupy the land and make large and valuable improvements upon it, but that they are now entitled to charge the defendant company with having taken the lands as by an appropriation, at least an appropriation in fact; and, therefore, that they should have compensation for the value of the land, which they declare to be six hundred thousand dollars. This, in short, is this ninth amended petition.

I need not recite the defenses. It is sufficient to say, as solely bearing upon what I shall pass upon in this case, that they deny that this condition was not performed. They allege in their answer that the company did perform it; that it built and operated its road and has been running it ever since; that it built it and operated it within the time mentioned, the two years specified in this condition subsequent, or whatever it may be, and that they did expend, as alleged in the petition, large sums of money in making large and valuable improvements and changing the aspect of the land, and they claim the plaintiffs are estopped from any relief by reason of the fact that they never made, up to the time of the commencement of the action, any claim of recovery of the land, nor any objection to the railroad company's using it, or that the condition had not been performed.

The rights of the plaintiffs to recover I have simply stated as they make it, that is, that under the facts and circumstances



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of the case they were entitled to charge the company with the value of the premises, because compensation has never been paid and the company have appropriated in fact, the land; and, as I have said, the court below held that action could not be maintained by the plaintiffs and so charged the jury.

It is entirely immaterial, as we think, and as viewed by the court below, what the condition was, whether it was a covenant or a condition subsequent; but we are not disposed to hesitate about the matter, and consider it in the light claimed by the plaintiffs, that it was a condition subsequent and the performance of which might avoid the estate. If a condition subsequent, however, the thing did not work of itself, it had to be worked by somebody. A plow is a good thing to plow up land with, but it won't do much effective excavation unless somebody uses it with some kind of force. So a condition subsequent is a very good thing to rely upon, but it don't work out any one's rights of itself; the grantor in the deed must do something. If he wants to recover the land on the ground that the condition subsequent has not been performed, he has either got to enter the premises and take possession on that ground for the reason that the condition was not performed, or else he has to apply to a court that can grant him that relief and have the forfeiture declared and a reconveyance ordered of the premises. They commenced an action for that purpose upon ejectment in this instance, and finding that would not hold, they abandoned it; that is, we assume so, because it would not hold. An action of ejectment under the circumstances stated here, was not a remedy open to these parties, and we assume that is the reason they abandoned it, but the title remains in the grantee until some act is done by which he is ousted from the premises, either by the act of the party or by an act of the court, and the mere saying that the condition has not been complied with, works nothing for either party; it does not disturb title or possession of the grantee in any sense or form.

It seems to be assumed by counsel in argument here, that the mere declaration on their part that the condition was not performed works a forfeiture of all right and that they are entitled to recover the land. That is the assumption, and yet in these

same briefs, counsel for the plaintiffs in error, say this: "A conveyance upon a condition subsequent passes a present estate in the land subject to be defeated by non-performance of the condition and the estate continues until avoided for breach of the condition by one having a right to avoid it." It is expressed in a little different language from mine, but it includes what I have said, that some one, who has a right to avoid it, must in some way avoid it, either by taking possession of the premises and ousting the grantee on the ground that he has not performed the condition, or else by application to a court of justice upon that proposition. They say: "If devised, the condition is transmitted, for the condition endures until performed, destroyed, released, waived or barred;" and the same admissions are substantially made in this long brief of our Brother Jones; and yet, after all, as I have said, the arguments proceeded upon the proposition all the way through, that the mere claim on the part of the vendor or grantor, that the condition has not been performed, avoids the estate, and we are entitled to recover the full value of it, if the party don't give it up, without entering into the estate and dispossessing the grantee or without having an order or decree of the court to confirm it.

As I have read from their own briefs, the right to enforce a forfeiture in such a case may be waived and barred. It is expressly waived in this case, waived in the petition. They were compelled to waive it, I suppose, from the knowledge of the fact that the deed was made early in 1871, and the condition subsequent was to be performed within two years, and from that time on to 1890—seventeen years after the condition was to be performed (the road to be built and operated)—the plaintiffs remained quiet, allowing, as they say, the railroad company to be in possession and make large and valuable improvements and expend a large amount of money upon the land; and it is evident from these undisputed facts, that they waived the performance of that condition and they were barred from enforcing it. The facts show that they waived it and were barred from enforcing the condition subsequent, and therefore the estate remains in the grantee, the title is there, the railroad company is owner in fee of the land; and I say these facts not only appear uncontro-

verted and undisputed, but it is pressed as a ground for recovery in this ninth amended petition, that they did in fact waive the performance of the condition, waive it as a forfeiture, but they say that the condition was not in fact performed, and by reason of that, they still have the title and they offer it and deposit a deed with the clerk of the court of the lands to the defendants, and ask to recover the value of the land as upon appropriation, alleging that the company was not entitled to the land under the deed by reason of the failure to perform the condition, and therefore they must be considered as having appropriated it in fact wrongfully and without a right.

That is getting into a muddle of contradictions that I am not able to properly extricate. If, by way of error, the grantee becomes absolutely vested with the title to the premises, I do not see what title there is left in the plaintiffs to convey, and if that is so, I am at a loss to know what remedy they have. If they have a remedy, what is it? What else is left them, if they have waived the condition and the estate has become absolute in the vendees?

As I have stated, the court below held that in all events they could not maintain this action, and it is sufficient for us to determine whether the court was right in that or not. We are not called upon to determine whether there is any possible remedy left open to the grantors, the Fields. It is time enough to decide cases when they arise. The question is whether they were entitled to maintain this action. If they were not, that ends the question before this court at this time.

Is it true, or is it the law, that under such circumstances, being unable to recover or enforce a forfeiture of a condition subsequent, if there was one, unable to do that by reason of their own conduct, if for nothing else, if the condition had not been performed to the letter, unable to enforce it by reason of their own conduct—standing silently by for seventeen years and uttering no word of complaint—never suggesting to this railroad company “you do not own that land, here was a condition subsequent, you should have performed it but you have not performed it”—standing quietly by and perceptibly reaping the benefits to their other land of the construction of the road as it was run—for, according to the evidence, an immense traffic had been put upon it—

not by way of carrying passengers but of freight, they reaping the benefit of it and standing by, I say, are they entitled now to maintain this action to recover as upon an appropriation, in fact, upon the assumption that the facts in the case show that the company got possession, or is holding possession of the land under its power of eminent domain, an appropriation in fact, although not in law? It is somewhat difficult to grant them that proposition, that they are entitled to anything like that, and say they may recover six hundred thousand dollars for the value of these premises.

As I have said, I need not undertake to decide whether they have any remedy at all or not. If they have any, perhaps it would be an action for damage, for a breach of contract, if there is anything left, but I am at a loss to see how they can maintain this action, or in what respect the position assumed by the court of common pleas was wrong.

The much larger part of these briefs are devoted to the question of the construction of this deed, whether it is a condition subsequent or a covenant, and but little is said in regard to the right to maintain this action in its present form, so far as I could make out, and I have examined the authorities submitted by counsel for the plaintiffs in error upon that question. That is the only question we have in the case, because, as I have already said, as the court below said, it is entirely immaterial what you call that condition, whether you call it a covenant or a condition subsequent, if it is one by reason of the waiver, from the fact that they are barred from enforcing it as such, so it is entirely immaterial what you call it; the name gives no sanctity to it in any way or form.

They rely and cite to us *Chapman v. Railway Co.*, 6 Ohio St., 119, as sanctioning this action. It is a long case and I am not going to take up much time with it. I will read but two paragraphs of it, and I take that from the opinion; on page 139 the court say:

“The analogies, spirit and policy of the statutes before quoted, seem to point to such a remedy, and we are strongly impressed with the conviction that the equities of the case demand it. The particular injunction prayed for by the complainants in this case,

is in the nature of, and is sought by the complainants, in order that it may operate so as to enforce a specific performance of the contracts between them and the railroad company.

"It seems to be well settled that where it is found that a complainant was originally entitled to a specific performance, but pending the litigation, the very subject matter of the agreement, to which the complainant is found to be entitled, is abstracted or destroyed, a court of equity will not turn him over to seek his damages in a court of law, but will afford a remedy by compensation."

We concede that law to the fullest extent. No doubt it is true and beyond question, that where a party commences a proceeding for a specific performance of a contract, or, as the court here puts it, for an injunction, and looking to that remedy and pending that litigation, finding that he was originally entitled to a specific performance, the defendant abstracts or destroys the property in controversy, so that specific performance can not be decreed, a court of equity will afford him a remedy by compensation for the property which he ought to have received. That is good law or good equity, if you please, which is enforced in courts of equity. Whether it is appropriately applied to *Chapman v. Railway Co.*, *supra*, I will not say, but it was an action commenced originally for an injunction, as the court declares, and they find the parties were entitled to that injunction originally and that the property became destroyed in litigation. If that has any bearing upon this case before us, to show that these parties are entitled to recover the value of these premises, why we are not able to see it.

A quite recent case is next cited; and in this connection I may say that it is a little difficult to understand from the petition and from the arguments submitted by some counsel for the plaintiffs as compared with the arguments of others of them, whether the argument is predicated upon the statute of the state, or whether they claim the right to exist independent of the statute. As to *Fries v. Railway Co.*, 56 Ohio St., 135, Spear, J., delivering the opinion, on page 136, says this:

"It appeared by the second amended petition, among other things, that the land taken (three and 56-100 acres) was part of a farm in Huron county, to which plaintiff, April 3, 1880, ac-

quired title, with every claim and right of action of the former owner; that prior to that date the Wheeling & Lake Erie Railroad Company, without the consent of the owners, took possession of the strip and constructed its railroad thereon; that June 25, 1886, the Wheeling & Lake Erie Railway Company, the successor of the said railroad company, without any grant or conveyance from or agreement with the plaintiff; without any right or title, legal or equitable thereto, and with the verbal consent of plaintiff on condition of compensation never performed, took possession of said strip, and has since used and now uses it as an integrad part of its permanent railroad.

"It was originally taken possession of without the consent of the owner, not under a deed conveying the title, transferring the title and the possession both as in this case—but it was a case where the defendant had taken possession without right or authority of any character, without the consent of the owner, and Judge Spear says further along in regard to this:

"As to the right of ejectment we suppose the law is entirely settled. He could not have that remedy. His consent to the entry would estop him (*Goodin v. Canal Co.*, 18 Ohio St., 169; *Penna. Co. v. Platt*, 47 Ohio St., 366). The reason for the rule lies in considerations of public convenience."

Then again, who are they that are entitled to the benefit of this statute? The court says, "Why, all owners whose lands have been taken by such corporation and have not been appropriated and paid for, or are not held by any agreement in writing with the owner, shall have the benefit of this statute." And again, "If an agreement in writing has been executed by which the land is held, that is the measure of the owner's rights and such owner can not have the benefit of the statute. Verbal agreements are not recognized as binding, for the same reason, doubtless, that induced the enactment of our statute of frauds with respect to verbal contracts for lands, viz: to prevent frauds and perjuries. The natural effect of the words used is, that if the owner has a contract in writing, on which he may rely, that must be his sole reliance." It would hardly be worth while to read any more of that. That excludes the plaintiffs in this case from any such remedy, at least under the statute referred to, by which parties whose lands are taken without right or held without contract in writing, may compel an appropriation or may sue for compensation as upon appropriation. Section 6448, Revised Statutes.

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In this case the land was taken possession of under an agreement in writing, under a deed conveying the legal title, and has evidently been held ever since in the same way.

The next case they refer to is *Longworth v. Cincinnati*, 48 Ohio St., 637, and I do not mean to take up much time with that case. Spear, J., delivered the opinion in that case also, and he says on page 640:

“It was shown by the pleadings that the city had wrongfully taken possession of the plaintiff’s property, and had devoted it to the purposes of a street, a public use. No appropriation in accordance with law had been made, nor had compensation in money, or otherwise been awarded the owners. The city simply took the property by force and was continuing its unlawful use, refusing to yield it up to the owners, and also refusing to make any compensation for it, thus disregarding the plaintiff’s natural rights, and violating their constitutional right secured by that section of the Constitution which provides that private property shall ever be held inviolate but subservient to the public welfare, and where taken for public use, a compensation therefor shall first be made in money.”

It is hardly necessary to say anything more about that. Where a city had taken possession without any lawful authority by force and held the property for street purposes, there, undoubtedly, this statute would apply, because the city was not in possession under a contract in writing and had paid nothing, and in that character of a case it is well settled that the party may have one of the two remedies. He may sue for compensation for the value of the property, bringing in a deed and offering to convey the title, so when he gets the compensation the other party will have the title if it has not in the beginning, or he may compel any appropriation under Section 6448, Revised Statutes, the statute, which the court say is a cumulative remedy only, but it affords no aid to us here, where the parties are in possession under a conveyance.

The next case is *Platt v. Pennsylvania Co.*, 43 Ohio St., 228. Now that was a peculiar case. Originally the Lake Shore Company had commenced appropriation proceedings and had by appropriation proceedings obtained possession of the strip in question, one hundred feet wide. Many years thereafter, not

desiring to hold the whole strip, not using it all, they conveyed twenty-five feet of it to the Pennsylvania Company, who thereupon entered against the protest of the former owner or the owners, and built its road and tracks and raised them up above the level of the Lake Shore, so as to cut off his communication to other parts and in that original appropriation not a dollar was paid for the land. Under the old Constitution, they could set off benefits against the damages and so it was fixed in that case; they just balanced the thing up, and the owner of the land got nothing at all in compensation for his premises, when it was appropriated by the Lake Shore road. In addition thereto the Pennsylvania Company took an additional amount of land and this action grew out of those facts. "The Lake Shore Company acquired an easement only, though an easement in perpetuity, and where there is an abandonment of such easement, the interest acquired reverts to the owner of the fee;" and it was held by the court that the action of the Lake Shore Railroad Company was an abandonment of that portion of the land originally appropriated to its use, having been abandoned by that company as not being necessary or needed for the operation of its road, and that by reason of such abandonment, the title and the fee and the right of possession all reverted to the owner.

Now you see what a different state of facts that presents from the one before us. It was an appropriation proceeding for which he had not received a dollar, therefore the owner who owned the fee was entitled to recover it, but he acquiesced in the appropriation, in fact made of it by the Pennsylvania Company and tendered the deed and asked for the value of it and he got it, and it has no more application to the case at bar than any of the other cases I have referred to.

There is one case cited or referred to in the brief of counsel in that case and commented upon by the court; that is *Junction Railroad Company v. Ruggles*, 7 Ohio St., 1.

"It appeared that Ruggles executed to the Ohio Railroad Company an instrument in writing, under seal, agreeing that if the company would locate its road through any lands possessed by him, he would quit-claim to it so much land as the company was authorized to take, to-wit, a strip one hundred feet in width through such lands, for the purpose of location and



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construction of the road, with the right to immediate possession, and of taking and converting to their own use stone, gravel, etc. The company located its road through the lands of Ruggles, but before the road was completed, the state, which had loaned its credit to the company, took possession of and subsequently sold the road, under the act of 1837 and a joint resolution passed in 1845. Ebenezer Lane became purchaser, who conveyed his title to the Junction Railroad Company, and that company proceeded to build the road through the lands of Ruggles on the strip so located by the Ohio Railroad Company, Ruggles objecting and threatening to bring suit, the Junction Railroad Company commenced an action and obtained an injunction restraining him from interfering with the construction of the road, and this court made the injunction perpetual. Stress is placed by the court, and properly placed, on the fact that the rights, as against Ruggles, were acquired, not by invoking the power of eminent domain, but by contract, and the case really turned on the assignability of the contract, in view of the terms of the agreement, the legislation and the existing facts."

So here the possession acquired by the defendant in this case was not under the power of eminent domain, or any claimed exercise of any such power, but was by deed conveying title to it, and confessedly it has that title now and it has possession and has ever since retained possession under that deed.

Now under this statute of the state (see Sections 6448, Revised Statutes, *et seq.*) authorizing a compulsory appropriation proceeding, certainly this proceeding could not be maintained for the reason that possession is held under and by virtue of a writing or a contract between the parties, and that contract is the sole measure of the remedy or rights of either, although this was the precise point upon which the case went off below, the court charging that this kind of a case or this particular case, seeking for a recovery of the value as upon an appropriation in fact, could not be maintained; no case has been cited by counsel, wherein it ever said it could be maintained, not one; I mean a case anything similar in facts to this, where the land was taken possession of, nor under the exercise of the power of eminent domain, whether in fact or in law they shall appropriate, not under that, but where possession was taken and given under the deed, under the title; any such case as

that, where the remedy is left to the party—where he is barred from claiming the forfeiture and can not rely upon the condition subsequent; any case that holds that in such an instance or under such a state of facts he may maintain an action to recover the full value of the premises as if no contract had ever been made; no such case of that character has been submitted to us and we can conceive of no such right vesting in the party.

If there is any remedy at all, it may be, as intimated by the court below in the fore part of its charge, an action for damages for a breach of contract, but it is time enough to pass upon that question when it arises. Suffice it to say, that here it is clear to us that this action can not be maintained and that the court below did not err in so charging the jury.

This disposes of the case and we need not refer to the second proposition, which the court charged the jury also prevented a recovery, that this condition was substantially performed, because it is entirely immaterial in this case whether it was performed or not. There is no right to maintain this action upon any principle of law or equity that we are aware of, and none certainly has been given to us, which shows that the party has any such right.

The judgment of the court below is therefore affirmed.

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**DEDICATION OF PUBLIC SQUARE.**

[Circuit Court of Hamilton County.]

LUNKENHEIMER CO. ET AL V. CITY OF CINCINNATI ET AL.

Decided, July, 1902.

*Public Square—Designation of, on Plat—Acceptance of, by Municipality Necessary—Levying Assessment Against, Works an Estoppel—Injunction Will Lie Against Interference with Interest.*

- 1 Designating on a plat duly recorded a certain space as a "public square" does not vest title in the city, unless such "public square" is accepted by ordinance or some other act.
2. The levying of assessments against such "public square" for the improvement of an alley abutting thereon estops the city from appropriating the space for public use by accepting the dedication.
3. Under such a state of facts the plaintiff, owner of property abutting on the space designated as "public square," has obtained such an interest therein as to entitle him to an injunction against interference with such interest, but not such an interest as to give him title in fee.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

Heard on error.

The strip of ground in controversy was designated "Public Ground" on the plat of Jesse Hunt, the original proprietor, made in 1807; but the City of Cincinnati never accepted the dedication, if it be such, either by ordinance or other act. On the contrary it levied and collected assessments for the improvement of the adjacent alleys upon the plaintiffs and their grantors as the owners of the land in dispute.

The testimony shows that the plaintiffs, about the year 1881, erected and have since maintained valuable and permanent improvements on the premises and have ever since been in the actual, open, exclusive and adverse possession of the same. Prior to that time the possession was not exclusive and adverse, nor does the petition contain any such averment.

It is claimed that these improvements were made only after obtaining the consent of the city, thereby recognizing its title; but on the contrary its knowledge of the character of plaintiff's possession together with the fact that it levied assessments

against the plaintiffs and their grantors as the owners of the land should now estop it from appropriating the same to public use by accepting the dedication.

We think, therefore, the plaintiffs are entitled to an injunction as prayed for, although not the owners in fee as averred.

*P. J. Cadwalader and Ben B. Dale*, for plaintiffs in error.

*Charles J. Hunt*, contra.

#### LIABILITY FOR DEATH OF A FREIGHT CONDUCTOR WHO FELL FROM HIS TRAIN.

[Circuit Court of Huron County.]

MARY CRAWFORD v. NEW YORK, CHICAGO & ST. LOUIS  
RAILROAD CO.

Decided, 1901.

*Railways—Negligence—Voluntary Assumption of Risk by Conductor—  
In Leaving His Caboose to Observe Signal Lights—And in Using  
Defectively Equipped Caboose—Delay in Changing Lights—Sudden  
Jerk of Train—Ballast Along Side of the Track—Jury Must Not  
Guess at Cause of Accident.*

- A freight conductor, who had used for more than a year without complaint a caboose defectively equipped for safety, stepped from the caboose, contrary to the rules of the company, upon the car next ahead, which was a gondola, for the purpose of observing whether the light at the station the train was approaching showed red or white, and in attempting to return to the caboose fell between the cars and was run over and killed. *Held:*
1. That he had assumed the risk of an improperly equipped caboose, and also the risk of going onto the gondola car.
  2. That the uncertainty whether he fell between the cars by reason of a misstep, or a jerk of the train, would not permit of a guess by the jury that his fall was due to a jerk of the train; and moreover a jerk of the train was liable to occur, and he should have been on his guard expecting it to occur.
  3. That the presence of ballast piled a foot or less high alongside of the track was not an impediment to his escaping from between the wheels, which were upon him in an instant rendering escape impossible under any circumstances.

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HULL, J.; HAYNES, J., and MOONEY, J. (sitting in place of PARKER, J.), concur.

Plaintiff in error in this action was plaintiff below and judgment having been rendered against her in the court of common pleas, this proceeding in error is prosecuted to reverse that judgment.

She brought her action as administratrix of the estate of John M. Crawford, deceased, under the statute to recover for the death of Crawford, who was the husband of the plaintiff, and whose death, it is claimed, was caused by the negligence of the railroad company.

The accident in which Crawford lost his life occurred in May, 1898. He was for a long time prior to the accident employed by the railroad company, and at the time of his death was a freight conductor and had been for some time prior to his death. He was the conductor of the train in question, and operated the caboose from which he fell for about a year prior to his death.

On the night of the accident he left Bellevue with his train about 11 o'clock or a little after, proceeding eastward. When they were near the station at Kimball, which is a few miles east of Bellevue, Crawford was in the caboose, the train slackened its speed as they approached the station of Kimball, which is also a crossing of the Nickel Plate (the name by which defendant is called) with the Baltimore & Ohio Railroad. The signal light at the station, as they approached, was red, which indicated, as long as it continued red, that the train was to stop at that station for orders, and pursuant to this signal, as the train approached the station, the engineer put on the brakes and slackened the speed of the train.

Without, at this time, going into the details of the accident, I will say that Crawford was sitting in the caboose as they approached the station, and before they reached the station or crossing he stepped out of the caboose onto, or across onto, a gondola freight car which was just ahead of the caboose, and while there he attempted to look out to see how the light was. There was a brakeman there also by the name of Mahoney, and

while at this place and in this position the light was changed from red to white, the white light meaning that the train might proceed. Crawford then started back to the caboose, and as he was going back in some way he fell off the train and was run over, probably by the four wheels on the south side of the caboose, and when the train stopped, it backed up a little so that the hind wheel of the hind truck ran over him again and he was instantly killed, or died within a few minutes after his body was taken from this position, between the wheels.

There are various acts of negligence alleged and complained of against the railroad company, which it was claimed by the plaintiff was the cause of the death of Crawford.

The case was tried in the court of common pleas to a jury, and at the conclusion of the testimony for the plaintiff, upon the motion of the defendant, the jury was instructed to return a verdict in favor of the defendant, which was accordingly done and judgment entered thereon. It is this judgment that is sought to be reversed in this proceeding in error.

The amended petition, after setting forth in detail the grievances of which the plaintiff complains, contains a brief summary of the alleged negligence of the defendant, which is as follows:

"The plaintiff says that said Crawford was without fault or negligence upon his part and that the injury was caused by and on account of the negligent acts of the defendant in the following particulars, to-wit:

"First. In indicating at said station of Kimball by said red light that there were orders there for said train, when in fact there were no orders at said station for said train.

"Second. In leaving said gravel along the side of said track for the length of time described in this petition.

"Third. In starting said train suddenly and without warning after having given a signal to stop said train for the purpose of receiving said orders.

"Fourth. In said operator giving to said engineer the signal to proceed without requiring him to come to a full stop, and giving him the said clearance card in accordance with the rule described in this petition.

"Fifth. In not providing and enforcing a rule requiring said engineer to give a signal by whistle or otherwise that he was about to increase the speed of said train, suddenly after hav-

ing given a signal to stop for the purpose of receiving said orders.

"Sixth. In using upon said railway the caboose that was defective, in not having at each end a sufficient platform and a hand-rail for use upon occasion similar to the one described in this petition.

"Seventh. In not providing a step at the end of such caboose upon which the said J. M. Crawford could stand when about to alight from said caboose for the purpose of receiving said orders; and

"Eight. Not providing at the end of said caboose a guard or rail to which the said J. M. Crawford could cling when about to alight from said caboose for the purpose of receiving said orders."

The error complained, which practically covers the whole case, is the action of the court in taking the case away from the jury.

The question is whether, as the evidence stood at the conclusion of plaintiff's testimony, there was any evidence which ought, under the rules of law, to have been submitted to the jury. If there was no evidence to show negligence on the part of the railroad company, or, if there was evidence which showed, as a matter of law, that the plaintiff's decedent himself was guilty of contributory negligence, then as a matter of law the court properly instructed the jury to return a verdict in favor of the defendant.

It will be well to consider first just what the situation was at the time of the accident. As I have said, Crawford left Bellevue with his train about 11 o'clock that night. As the train approached Kimball, the station in question, which is a few miles east of Bellevue, he was sitting in the caboose looking out of the window from the side of the car, and from that point could observe the light as they approached the station, and as the train approached the station the engineer gave a long whistle, a signal to stop, and slackened the speed of the train, the signal light at the station being red. The rules of the company provided that the light should be kept red at all times except when a signal was given to the train that there were no orders for it and that it might proceed; that is to say, the proper color for the light to be at all times was red, and if there was no reason

why the train should stop, if there were no orders for it, then the operator changed the color to white and the train might proceed.

Then, the light being red, as the train approached, the engineer slackened and the conductor could have seen that the light was red. He knew that unless the light was changed, the train would stop for orders which it would be his duty to get.

The brakeman, Mahoney, was sitting on the gondola car just ahead of the caboose. The door in the end of the caboose was open, and as Crawford sat in his car checking up his bills near the window, instead, apparently, of taking particular pains to look at the light himself, he called to Mahoney and asked him how the light was, and Mahoney told him it was red, and then, apparently wishing to see for himself, he came out at the end door and stepped across onto the gondola car. There was no platform on the end of the car. It was a box freight car that had been made over into a caboose, and there was nothing there except a narrow step over the draw-bar, probably about eighteen inches wide. He stepped onto that and crossed over to the gondola car and sat down on the edge of the gondola and looked around the corner or end of the car to look ahead for himself and see what the color of the light was, the brakeman having said to him before, as the record shows, "it is red now."

Mahoney testifies that Crawford came out of the caboose and looked out, and as he looked out, Mahoney testifies, "I says, all right, it is white." Then he started back into the caboose. The train from the time they first began to slacken speed, as they approached the station—during all that time, the train was continuing to slacken, and we think the record shows very clearly that the train did not stop until after Crawford fell off, although there may be a word here and there in Mahoney's testimony which might indicate that it did, but he evidently did not mean to say that, as shown by his whole testimony. The train was continuing to slacken all the time, and Mr. Crawford knew that if the light remained red, that the train would come to, and was required to come to a full stop, but if the light turned to white it would proceed without stopping for orders.



The evidence clearly shows that it was the custom for this train to proceed without stopping if the light changed from red to white. We are not able to say, upon examination of the rules, that would be a violation of the rules, if the light was changed from red to white, although the light had remained red until the train was nearly ready to stop.

Mahoney looked at the light after Crawford came out on the car and said, "All right, it is white." Crawford then knew that the train would go ahead. He knew that from the rules. He knew that from custom, and his conduct shows that he knew it, for he at once started back into the caboose upon this information from Mahoney, and he saw or could have seen the light himself.

As Crawford started back into the caboose the engineer apparently was putting on the air and it caused the cars to run together. Mahoney heard the noise and Crawford, being there, must have heard the same thing that Mahoney did, and Mahoney called out to Crawford and said, "Look out, John." Just at that time, or just before that, John had started back toward the caboose. Mahoney says, "I says, 'look out, John,' and with those words I braced myself and the next thing I heard was the rattling of his lamp and he says the caboose fell back on the rail. As the caboose went onto the rail, I hollered and asked him if he was hurt and the next place he was out on the ground." He got off, and soon after he got off the train stopped and then started up again, and he signalled the train then to stop and they stopped and he found Crawford's body, as I have already stated, between two wheels, the south wheels of the rear truck. The four wheels had passed over him, then the train had backed a little and the last wheel passed over him again.

There are, as I have said, several grounds of negligence alleged, one of the grounds being that there was no rule of the company requiring the engineer to give a signal when he was about to stop or start his train upon an occasion of this kind, but there was a rule, however, forbidding his starting unless the conductor gave him a signal, but there was no rule requiring him to give a signal when about to stop his train suddenly, and it is argued by the plaintiff in error that the question should

have been left to the jury whether ordinary care required the railroad company to have such a rule. The evidence shows the engineer was trying to stop the train when Crawford fell off, and it is claimed that the danger to trainmen in such stopping of the train is such that ordinary care requires that there be a rule requiring the engineer to give a signal, or at any rate that it was a proper question to leave to the jury.

There was a rule of the company which required the conductor of a freight train, while his train was in motion, to be in his caboose or on the top of the caboose. Rule No. 243 says that the proper place for the freight conductor while his train is in motion is in the cupola of his train, if it have one, so that he may have a full view of his train and enable him to see that his men perform their duty and know that his brakemen come out promptly when necessary, and he must keep a sharp lookout, etc.

Passing at this time to the other question, as to whether there should have been a rule requiring a signal to be given, and whether the fact that there was not such a rule contributed to Crawford's injury. As has been suggested, when this train neared the station, perhaps forty or fifty cars away, Crawford knew or by looking out of the window at the side of the car might have known that the light was red, and that that meant, if it continued red, that his train was to stop; but not caring to rely entirely upon his own observation, for some reason he asked Mahoney, and Mahoney told him that the light was red and he knew that the train, if the light continued red, would stop. Then, to make observation for himself, or so that he might be where he could get off easily, if the light turned to white, he came out and stepped over onto the gondola car, the light still being red and the train during all of this time slackening in speed and the engineer all this time evidently putting on the brakes for the purpose of stopping the train and finally putting them on with such force that the cars were bumped together, as Mahoney testifies, and finally Crawford is notified by Mahoney calling out to him to "look out," the train was about to stop, that there might be danger. Crawford at that time being about to step from the gondola car to the caboose.

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With all of these circumstances, with this notice to Crawford that the train was about to stop, with his knowledge of the rules that it was required to stop if the light was red, with his experience as a railroad man, as an old railroad man, knowing that the train was in the very act of stopping, it seems to us that a signal from the locomotive would not have given Crawford any further notice than he then had of the fact that the train was about to stop. There was every sign, every notice, every indication that could be given, that the train was stopping pursuant to the order that was given by the red light, and the whistling or the ringing of the bell from the locomotive could have given him no additional information—could have made no difference with his conduct upon that occasion. It is claimed by counsel for plaintiff in error that ordinary care might require the giving of such signal; and it is claimed the question should have been submitted to the jury as to whether ordinary care on the part of the railroad company required a rule compelling such signal. But if the absence of such a signal did not contribute in any way to the injury and death of Crawford, it was not, as the term is sometimes used, "legal negligence" so far as this case is concerned, that is, negligence directly causing the injury and death complained of. And we find the absence of the signal here or the absence of the rule did not contribute in any way to the injury and death of Crawford.

If, on the other hand, the train had actually stopped on account of the red signal being given, Crawford had notice that the light had been changed from red to white, and he knew that the train would proceed immediately upon its journey and would start at once after the light was changed from red to white. The evidence shows clearly that that was the custom upon this train, although it might be argued that this was a technical violation of the rule. Still, upon an examination of that rule it is not clear that it would be—the rule is No. 522, page 98 of the book of rules:

"A fixed signal must be used at each train order office which shall display red at all times where there is an operator on duty, except when changed to white, to allow a train to pass after getting orders, or for which there are no orders. When

red is displayed all trains must come to a full stop and not proceed as long as red is displayed, unless furnished with a clearance card on specified form, stating over the operator's signature that he has no orders for that train."

It is urged that there should have been a clearance card given. But the rule provides that trains shall not proceed so long as red is displayed unless furnished with a clearance card on a specified form. But red was no longer displayed when the light was changed from red to white. The rule proceeds:

"The signal must be returned to red as soon as a train has passed. It must only be fastened at red when no operator is on duty."

But aside from any close construction of this rule, it appears from the testimony that it was the custom of this train, when the light was changed, for the train at once to proceed. It was their custom, as the uncontradicted testimony shows, to watch for this light, as the train approached, and if it was red, to watch to see whether it would change to white. The light on the night in question did not change to white until the locomotive was about opposite the signal station, opposite the light, or perhaps a little past the light. So that in either event, as we view it, whether the train was nearly stopped, or about to stop apparently, or whether it had actually stopped and started again, Crawford, with his knowledge of this rule and of the custom, was fully notified of exactly what he might expect the train to do, and that the absence of the signal did not contribute in any degree to his injury.

It is urged also that there was negligence in the operator in displaying the red light as long as he did and not changing it to white; that he should have changed the light sooner, and that holding it red so long, indicated there were orders while there were none.

If this were true, it does not seem to us that that was the proximate cause of Crawford's injury. Holding the light red did not cause this injury, nor was it caused by changing it to white. Crawford may have taken a position upon the outside of the car which he would not otherwise have taken if the light

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had turned to white sooner than it did. But we are unable to see that what was done with this light could be regarded as the proximate cause of his injury. As to his going out on the car, his proper place, under the rules, was in the caboose; still, under all the circumstances, it is not necessary to hold that he was guilty of contributory negligence in going outside of the car. Perhaps it would be the natural thing for him to do. Perhaps it was customary, but still if he went outside of the car, under those circumstances, or to the end of the car where there was no platform, on to a freight car, where the rules of the company did not require him to go, and where he was forbidden to go, it would seem as though he took his own chances as to an accident of this kind happening to him.

It appears from some of the testimony—an answer or two that we find in the record, that it may have been the custom to go ahead over the train and get off somewhere near the middle of the train. Probably it was the custom to go ahead and get off and get orders without compelling the train to come to a full stop. There was no rule requiring this, but a strict reading of the rule would require the conductor to be in the caboose.

As to the caboose itself, it is urged that it was defectively constructed and it must be said that a box freight car remodeled as this one was can hardly be commended as a caboose for men to use in the performance of their duty upon the road. Still it was a car that was in general use upon the road. Crawford had used this very car for over a year and he was fully acquainted with the car and the defects complained of, if any, and that there was no platform at the end of the car; there were no hand-holds to take hold of and nothing to save a man, or prevent him from falling off, and it is true that there was nothing there but this narrow step to which I have referred; it evidently was not the purpose or intention that the conductor and brakemen should stand there.

There was, however, at the side of the car, a door: a door and two windows on each side, and the door was provided with a step and with a hand-hold, as shown by one of the pictures attached to the bill of exceptions. The testimony shows that it was the intention that the men should get on and off at the

side and not at the end, where it had no platform of any kind, or guard, and only this step about eight inches wide and perhaps eighteen inches long crosswise of the car. But having used this car for this long period of time without complaint and having full knowledge of the defects in the car, it seems to us that under the well established rules of law he assumed whatever risk there was in continuing to occupy and use this car. It was something of which he had full knowledge and had had for more than a year.

But it does not appear—it is not established by the evidence—that Crawford was thrown off the car by the reason of any jar. He fell off about that time, and he may have been thrown off by the jar, or he may have missed his footing as he stepped from one car to the other and may have fallen off. All that Mahoney knows is that shortly after he said “look out, and heard the rattling of his lantern,” Crawford had fallen off the car. He may have been thrown off by the jar, it is true, but that he *was* thrown off by the jar is hardly established by the evidence.

The Supreme Court has said in a recent case that where an injury may have been caused by one of the two things, if one of them might have happened through one of the causes without any negligence on the part of the defendant, the jury would not be permitted to guess that it happened on account of the other.

It was urged further that there was negligence in leaving gravel alongside the track for some two or three weeks before the accident, and that this contributed to the injury, and that if it had not been for the gravel, Crawford might not have been killed. Gravel had been thrown off from the cars in the ordinary course of business for the use of the railroad company and left for a distance of forty or fifty car lengths alongside the track, at the height of not more than a foot, and in some places lower. Where Crawford was killed, according to the testimony, it was four, five or six inches in depth. Gravel had been thrown off for ballast for the road. This track was not in the yards of the company; it was a railroad crossing simply, and we are of the opinion that it was not negligence on the part of the railroad company to leave this amount of gravel which had been put

there for use, for two or three weeks, alongside the railroad track. It could not have been anticipated that a man would fall off at this point and fall onto the track between the rails in that way, and that this gravel would or might interfere with his getting out from under the wheels, nor does it appear to us that the gravel did in fact interfere or prevent Crawford from escaping injury.

When he was found his head was resting outside the rail upon the gravel some five or six inches in height, while his legs and the lower part of his body were between the rails, and the car passed across the middle of his body, crushing him. His arms were thrown in such a way as perhaps might indicate that he had tried to ward off the wheels and to pull himself out from under them. But lying or falling in this position, with the train in motion, the greater part of his body between the rails, his head projecting for some distance over upon the gravel, we are unable to see how this amount of gravel at that point contributed in any way to his injury or prevented him from escaping.

The injury happened in an instant of time. He fell immediately in front of the wheels of this caboose and they were on him in an instant, in the fraction of a second.

After a full review of the record in this case, unfortunate as this accident was and terrible a calamity as it was, we are unable to see that there was any evidence tending to show negligence on the part of the railroad company at the time of the accident that contributed to Crawford's injury or any negligence, or any risk in regard to the construction of the car that he did not himself waive and assume.

We find then that the court did right, under the rules of law, in directing a verdict in favor of the defendant.

We have examined the exceptions that were taken during the trial of the case, and while some of the testimony to which objection was sustained might have been admitted, we think, as to the custom of stopping at this point without putting in evidence the written rule, still, in the end, that testimony substantially was admitted and the rules themselves were put in evidence so that the plaintiff had the opportunity to present his case fully,

and no claim is made here that the plaintiff was prevented by the court from presenting the evidence and all the facts that he cared to present in order to make out his case.

We find no error prejudicial to the plaintiff in any ruling of the court upon the trial, and the judgment of the court of common pleas will be affirmed.

*Jesse Vickery* and *Horace Andrews*, for plaintiff in error.

*C. P. & L. W. Wickham*, for defendant in error.

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### PRESUMPTION OF DEATH.

[Circuit Court of Lorain County.]

TRAVELERS' INSURANCE CO. v. MARY ROSCH.\*

Decided, May 2, 1902.

*Accident Insurance—Disappearance of the Insured in Mid Ocean—Conclusive Presumption of Death from Accidental Drowning—Special Charges Before Argument—Section 5190 Not Peremptory, When—"Fair" Preponderance of Evidence.*

1. Where one was seen on a steamer in mid ocean at 10 o'clock at night, and was not found the next day, though diligent search for him was made, and has never been seen since either living or dead, it is a necessary conclusion that the man is dead.
2. It is also a necessary conclusion that he died by drowning, either from accident or the violence of another, or by casting himself into the sea; and the presumption being against suicide, a jury would be warranted in finding that he died by drowning, and that as to him the drowning was an accident.
3. If a special charge is of such a character that no prejudice would result from a refusal to give it to the jury at all, it is not prejudicial to decline to give it before argument, notwithstanding the peremptory interpretation which has been placed on Section 5190.
4. A preponderance of the evidence being sufficient in a civil case, and the word "fair" having been construed as equivalent to "clear," a court is justified in refusing to give a special charge as written, when it contains the words "fair preponderance of the evidence."

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\*Affirmed by the Supreme Court without report, December 8, 1903.



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MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The case of the Travelers' Insurance Company of Hartford, Connecticut, against Mary Rosch is here upon a petition in error, seeking to reverse a judgment which Mary Rosch obtained against the insurance company in a case tried in the court of common pleas of this county, it being a jury trial. With the petition in error a bill of exceptions is filed containing all the evidence that was produced in the court of common pleas.

The plaintiff below, Mary Rosch, having obtained a verdict against the defendant, a motion was made by the defendant for a new trial, which was overruled, an exception was taken to that, and it is said there was error on the part of the court in overruling such motion, and error also in the proceedings of the court at the trial.

After the evidence was all introduced, a request was made that certain propositions of law be given in charge to the jury before the argument of counsel. Some of these requests were given before argument, and part, the court said, would be taken under advisement, and later the court would determine whether or not to give these. After argument the court did give the last proposition, to which attention will be called later.

Section 5190, sub-section 5, Revised Statutes, is the one which provides that if request to charge certain propositions shall be made before argument, such propositions shall then be given or refused. This statute was construed in *Electric Railroad Co. v. Hawkins*, 64 Ohio St., 391.

Before determining whether there was error in declining to give, the proposition which the court did not give before argument, but did give later, a little attention should be given to facts.

John Rosch who was a resident of this city, took passage in June, 1897, upon an ocean steamer, "The Friesland," at New York, for some port in Germany. Shortly before he embarked on this voyage he took out a policy of insurance in the plaintiff company, which is a corporation authorized to issue accident insurance policies. It insured him against death resulting within ninety days from bodily injuries effected during the term of this

insurance through external, violent and accidental means, and the beneficiary named in the policy is Mary Rosch, the defendant in error.

On the night of June 29, 1897, while the ship was in mid-ocean, John Rosch, who was a steerage passenger with some two hundred other steerage passengers, was seen at ten o'clock in the evening on that steamer; so far as any evidence here is found he has never been seen since living or dead.

The steamer did not reach Germany for several days after that. Diligent search was made on the morning of June 30 for John Rosch, which was without avail; he was not on the steamer on that morning.

The claim on behalf of the plaintiff below is, that from this it necessarily follows he is dead, and we think that this presumption is well taken. It is possible that Rosch is living, as it is possible that if one sits in this court room and fires a pistol at another, and that other be found immediately thereafter dead with a bullet in his body, that he died of heart failure just before the bullet struck him; but everybody would find, every jury and every sensible man in the world would find in the case last stated that the man died from the bullet wound. And it seems as though we could not doubt that every sensible man with these facts before him would find this man is dead.

It is said, on the part of the plaintiff in error, that it is but an inference that he is dead. It is an inference, such an inference as carries absolute conviction to every thinking man.

Now it is said that to hold he died by external violence is an inference upon an inference—which ought not to be allowed; but the jury found as they necessarily must have found, that this man was dead.

And if the question had been directly put to them, did he die by drowning? it can hardly be doubted that they would have answered in the affirmative, and if he died by drowning he died by that external violence which is insured against in this policy, unless it was a case of suicide.

The policy provides that if the death is by suicide there can be no recovery.

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This man, if he died by drowning, fell into the ocean, either by accident or by violence of somebody else or he cast himself into the ocean. What is the presumption in that case; in favor of suicide or against it? Is there any doubt that the presumption is against suicide and in favor of his having fallen in, either by accident or by some external force applied to him? And if that is so, then there should be a recovery here; the company would be bound.

Upon the facts it seems clear that the jury came to the conclusion to which every other man, who will examine this record would come; that this man died of drowning on that night of June 29 or the morning of June 30, 1897, and that such drowning was the result of an accident to him.

Now as to the request made to charge before argument.

The case of *Electric Railroad Co. v. Hawkins*, to which attention has been called, holds as to Section 5190, Revised Statutes, requiring a charge when requested to be made before the argument, that it is peremptory where such request is made. Of course if a request is made to charge some proposition which is not the law, that must be given. But it is said here the court came to the conclusion that what was requested was the law, because it thereafter gave it; but if the giving or withholding of the charge could not by any possibility or by any reasonable probability have affected the result of this case, then it was not prejudicial to refuse to give it before argument.

If it would have been no prejudice to the plaintiff in error to have declined to give it to the jury at all, then it was not prejudicial to decline to give it before the argument.

The charge requested by the defendant below before argument reads in these words:

"Gentlemen of the jury, you will not be warranted in rendering a verdict for the plaintiff unless you shall find from a fair preponderance of the evidence, as I shall hereafter define that term:

"First. That John Rosch died during the time covered by the policy of insurance, and

"Second. That his death was caused by violent and accidental means."

It is enough to say as to this, that the request included one thing at least which it is settled, in this court, and I think by the Supreme Court of the state—certainly by this court and by the circuit court next east of us, the sixth—which the party was not entitled to have given.

It may be said to be technical, but this court and the court of the circuit east of us have held that it is objectionable to charge that "You will not be warranted in rendering a verdict for the plaintiff unless you shall find from a *fair* preponderance of the evidence," etc.

Judge Laubie, in one of the cases, discusses to a considerable extent the words "*fair* preponderance," and says it means the same as "*clear* preponderance" of the evidence, which he says is not necessary; that *preponderance* is enough. So the court would have been justified in refusing that because of the word "*fair*," and might have been justified in refusing the entire request for the same reason.

The court did give before argument, that in order to a recovery the jury must find:

First. That John Rosch died during the time covered by the policy of insurance, and

Second. That his death was caused by violent and accidental means.

He gave those two. He did not give until after argument the balance: "If you find that he died during such time, but further find that it is just as reasonable to infer, from the facts and circumstances in proof, that he died from voluntarily exposing himself to unnecessary danger as that he died from accidental and violent means, not specifically excepted in the policy, then your verdict must be for defendant."

That was given later; not given however that it must be done by a fair preponderance of the evidence, but the court gave, "if you find he died during such time," etc., using the exact language, except as to the word "*fair*."

It was not error, prejudicial to the plaintiff in error, for the court to refuse to give in the language requested, just what was requested before the argument. After the argument the court gave the proposition properly, so that there can be no fault

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found to the prejudice of the plaintiff in error in the charge.

What has already been said indicates what must be done with the case. The jury were warranted in coming to the conclusion they did from the facts.

There was no error on the part of the court in its refusal to charge before argument the requests in exactly the language they were requested; there was no error in the charge, and the judgment is affirmed.

*H. H. McKehan*, for plaintiff in error.

*Metcalf & Cinniger*, for defendant in error.

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### WILLS.

[Circuit Court of Auglaize County.]

WILLIAM HALLEY ET AL V. JOSEPH HENGSTLER AND SOPHIA HENGSTLER.

Decided, 1902.

*Wills—Construction of—Effect of Section 5968—Abrogating the Rule in Shelly's Case—Word "Heirs" to be Given its Technical Meaning—Unless a Contrary Intention Appears—Estate of Inheritance—Devise Conveying Estate in Fee.*

1. Section 5968 relating to construction of devises for life limited to heirs, does not establish a hard and fast rule of construction that must resolve all doubtful cases into devises of estates for life with remainder over, but permits courts to give controlling effect to the intention of the testator.
2. While the word "heirs" is flexible and should be so construed as to give effect to the manifest intention of the testator, it retains its strict technical meaning, unless from the context and other aids of construction it clearly appears that the testator used it in some other sense.
3. A devise of land to J and N "to be equally divided between them, and to their heirs at their death" conveys an estate in fee simple.

DAY, J., NORRIS, J., and PARKER, J., (of the sixth circuit, sitting in place of MOONEY, J.); opinion by PARKER, J.

Heard on error.

The whole controversy in this case turns upon the construction to be put on the third clause of the will of Samuel Halley, deceased, under which both parties claim. Other clauses of the will are unimportant here, except as their consideration may aid in the construction of this third clause, which reads as follows:

“Third. I will and bequeath to John Halley and Nathaniel Halley, one quarter section of land owned by me in Allen county, Ohio, to be equally divided between them, and to their heirs at their death.”

The will was executed in 1844. The testator died in 1845, seized in fee simple of the land mentioned in this clause. John Halley, mentioned therein, died intestate, in 1896, leaving certain of the plaintiffs his only heirs at law. Nathaniel Halley, mentioned in said item, died intestate, in 1898, leaving certain other of the plaintiffs his only heirs at law.

In 1850, John Halley and Nathaniel Halley, by an exchange of quit-claim deeds divided the lands described in said item, each taking a part thereof in severalty.

The defendants claim ownership of said lands under deeds executed by John Halley and Nathaniel Halley and a regular chain of title by a series of conveyances purporting to carry the title down to them as the last grantees.

Plaintiffs contend that by the will aforesaid John Halley and Nathaniel Halley were devised life estates only in said lands and that remainders in fee simple were devised to their heirs, consequently that estates for the lives only of said John Halley and Nathaniel Halley were carried by said conveyances to the defendants, and that upon the deaths of said John Halley and Nathaniel Halley, the plaintiffs, as their surviving heirs, came into full title in fee simple and right of possession of and to said lands. The defendants, on the other hand, contend that by force of said item three fee simple estates devolved upon and were vested in said John and Nathaniel upon the decease of the testator, and that such estates have been carried on to them by the conveyances aforesaid.

It will be observed that this will was executed and took effect after the passage and taking effect of the Wills Act of March

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23, 1840, which took effect October 1, 1840 (38 O. L., 120), Section 5968, Revised Statutes, Section 47 whereof containing the provision that:

“When lands, tenements or hereditaments are given by will, to any person, for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only, in such first taker, and a remainder in fee simple in his heirs” (Swan’s Gen. Stat., 1841, p. 999) which has ever since been a part of the Ohio laws as to wills.

Counsel for plaintiffs base their claim upon the statute, and urge that the language of this clause of the will comes within its provision, and that if this clause does not define precisely estates to John and Nathaniel for their lives, with remainder at their death to their heirs in fee, it does “by words to that effect” define and limit such estates; and they also urge that if this language of the will standing alone is not to be given that effect by force of the statute, the whole will taken together discloses that the purpose of the testator was to thus limit the estates devised. In support of their contention that the testator has manifested this intention, they lay especial stress upon the second clause of the will, whereby certain other lands are devised to certain other sons of the testator, to-wit:

“Second. I give and bequeath to my two sons, William and Samuel Halley, the farm owned by me in Noble township, Morgan county, Ohio, that I now occupy, to be equally divided between two, William and Samuel Halley.”

They argue that since in this clause the words “and to their heirs at their deaths,” or similar words, or words of like import, are not used, and since in Ohio words of inheritance are not necessary to transmit by will a fee simple estate, and the testator is to be presumed to have known the law on this subject, therefore the addition of the words in the third clause must have been with a design and purpose to devise to John and Nathaniel somewhat different estates from those devised to William and Samuel; and that the addition of the words “and to their heirs at their death” manifests a purpose to cut down the fee simple that would have been sufficiently defined without such addition, and to devise a remainder in fee simple to their heirs.

That though the term "heirs" is usually a term of limitation and not of purchase, yet as used here in connection with the words "at their death," it should be deemed a word of purchase and not of limitation. That the addition of the words "at their death" is equivalent to the use of the words "during their lives," or "for life," and were intended to denote the quantum of estate to be devised to John and Nathaniel.

In this brief statement we can not pretend or hope to do justice to the able arguments of counsel for plaintiffs, so well epitomized in their brief, but we seek simply to indicate the points in issue and the line of argument pursued.

It must be remembered that before the adoption of the statute heretofore quoted, the rule in Shelley's case had been recognized by the courts as a part of the common law in force in Ohio (*McFeely v. Moore*, 5 Ohio, 464), and the purposes and effect of this statute was to abrogate the rule as to wills (*King v. Beck*, 12 Ohio, 390, 471; *Armstrong v. Zane*, 12 Ohio, 287, 290); but the purposes of this law was not and its effect is not to establish a hard and fast rule of construction that must resolve all doubtful cases into devises of estates for life with remainder over, but simply to release us from a rule which carried us to the other extreme, and leave us at liberty to give controlling effect to the intention of the testator (*Carter v. Reddish*, 32 Ohio St., 1-17), and certain other rules respecting the construction of wills, and especially as to the use of the word "heirs," to which we shall advert, were not affected thereby.

Now while the word "heirs," when used in a will, is flexible, and should be so construed as to give effect to the manifest intention of the testator as ascertained by a due consideration of all the provisions of the will (*Weston v. Weston*, 38 Ohio St., 473, 478), yet it is a technical legal term, and in its primary use and meaning is a word of limitation defining an estate of inheritance, and not a word of purchase, designating a person or class upon whom an estate shall devolve by force of the instrument in which it is used (Paige on Wills, Section 561; *Jackson v. Alsop*, 34 Atl. Rep., 1106; 67 Conn., 24), and is to be given its strict technical meaning when used in a will, unless from the context or other aids of construction it appears clearly



that the testator used it in some other sense. *Weston v. Weston*, *supra*; *Paige on Wills*, *supra*; *Bolton v. Bank*, 50 Ohio St., 290; *Collins v. Collins*, 40 Ohio St., 353; *King v. Beck*, 15 Ohio, 559, 562; *Linton v. Laycock*, 33 Ohio St., 128.

*Prima facie*, therefore, the word "heirs" is to be taken as a word of limitation and not of purchase. We think the clause of the will under consideration does not in terms give the lands to John and Nathaniel "for life," nor does it in terms give the lands after their deaths to their heirs in fee. It is only by construction, and by holding that the testator has used "words to that effect," that the will can be given that operation. We are of the opinion that neither the clause in question nor the whole will taken together, makes clear or manifest an intention of the testator to devise life estates only to his sons, with remainders in fee to their heirs.

The added expression "And to their heirs at their death," though in a sense surplusage or tautological, is, nevertheless, appropriate to describe a fee simple in John and Nathaniel. "At their death," we believe should be regarded as surplusage merely. What it expresses is always understood, since a person can possess and enjoy his lands during his lifetime only. It is evident that the will was not so drawn by a person skilled in the use of legal terminology, since he uses the term "bequeath" where he should have written "devise," and other imperfections make such lack of skill or exactness apparent. Therefore, we think that much stress should not be laid upon the use of the words "And to their heirs at their death" in the third clause and not in the second. Having added the words "and their heirs" he may have thought it necessary or at least prudent to add the remainder "at their death," to make it clear that heirs presumptive should have no interest in or control over the lands while John and Nathaniel lived. So, too, such unskilled person may not have been acquainted with the rule made a statutory rule by Section 5970, Revised Statutes, and may have designed to devise a life estate only by the second clause and a fee simple by the third clause. We do not mean to suggest that a court would be warranted in putting such a construction upon the second clause, but we point out here possible constructions to

indicate the insecurity and uncertainty of speculations as to the intention of the testator, and the propriety of holding fast to the rule that the intention of the testator to use the word "heirs" in some other definite sense, must clearly appear before the court will be justified in treating it as other than a word of limitation.

It is true, as said by counsel for plaintiffs, if the will provided that after the death of John and Nathaniel the lands should go to certain named persons, or even if a person or class of persons were designated as "children," "grandchildren," "issue," or the like, it would carry no more than life estates to John and Nathaniel, with remainder to such persons or class, for such designations would not be words of limitation, merely determining the nature or quantum of the estate devised to the first takers, but they would be words of purchase, designating the persons or class who should take title direct from the devisor under the will. As pointed out, there is a wide difference where use is made of the general collective term "heirs," signifying all who might inherit from the first takers, *ad infinitum*.

We hold that by the third clause of this will John and Nathaniel took an estate in fee simple, and that the judgment of the common pleas was right, and, therefore, it is affirmed.

**NEGLIGENCE AT A RAILROAD CROSSING IN THE OPEN COUNTRY.**

[Circuit Court of Lake County.]

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. A. G. REYNOLDS, ADMINISTRATOR.

Decided, October Term, 1901.

*Railways—Negligence at Country Road Crossings—Company Not Bound to Provide Watchman or Safety Appliance at Such a Place—Failure of One Injured to Use His Faculties—Engineer Not Aware of His Peril—Proximate Cause of the Accident.*

1. A railroad company is under no obligation to take further precautions than those prescribed by statute as to a highway crossing in the open country, where there is an unobstructed view of the tracks for a distance of six or seven hundred feet.
2. It is error, therefore, to instruct a jury that it is for them to determine whether a watchman or safety appliances should have them provided for such a crossing, particularly where what was said in regard to safety appliances was indefinite and uncertain.
- 3 And it is likewise error to say to the jury that it was the duty of the plaintiff in approaching the crossing to have used his faculties, "unless there was reasonable excuse for his not doing so," when there was nothing in the testimony upon which an excuse for not looking and listening could be based.
4. In such a case the railroad company is entitled to an instruction to the effect that it was the duty of the plaintiff to have used his senses of seeing and hearing before attempting to cross, and if he failed to do so, and such failure caused or contributed proximately to his injury, there can be no recovery.
5. Where one travels for forty feet before reaching the tracks, with a train approaching and in full view, and with nothing else to divert his attention, and is struck by the train, a verdict against the railroad company is not justified. *C. H. & D. Ry. v. Kassen*, 49 O. S., 230, distinguished; *L. S. & M. S. Ry. v. Schade*, 15 C. C., 424, and *L. S. & M. S. Ry. v. Ehlert*, 19 C. C., 177, disapproved.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Heard on error.

Edward C. Corlett, plaintiff's intestate, was killed on the afternoon of September 15, 1897, while attempting to cross with a horse and buggy the tracks of The Lake Shore & Michigan

Southern Railway Company at what is known as "Casement Crossing" about a mile from Painesville, in this county. The crossing is a diagonal one and the highway for a short distance is close to the tracks but not sufficiently near to make it in that respect especially dangerous. Corlett was traveling in a south-westerly direction, the tracks running east and west at that point. The easterly view of the railway from the highway at some points as you approach the crossing is obscured for two or three thousand feet by houses, trees, undergrowth and particularly by a cut and curve; the evidence however conclusively shows that a traveler on the highway, sitting in a buggy as Corlett was at the time he was killed, has a full and unobstructed view eastward of approaching trains for a distance of six to seven hundred feet anywhere from a point forty feet on the highway to the north rail of the north track. No one was in the buggy with Corlett; his horse was not unmanageable; no other train was approaching; no one else was on the highway; the view was not obstructed westward, and he was traveling at a slow rate of speed.

With these conceded facts in the case, two objections are made to the judgment of the court of common pleas: First, That the court erred in its charge to the jury, and, second, that the verdict is against the evidence.

The first objection made to the charge is respecting the necessity of having some appliance at the crossing for the protection of travelers upon the highway. The clause of the charge objected to is as follows:

"There is no rule of law in Ohio requiring a railway company to keep a flagman or watchman at a railroad crossing outside of a municipality and the absence of one is not of itself negligence. But it was the duty of defendant, if it should appear that this particular crossing was exceptionally dangerous, to adopt such measures as common prudence, and a reasonable and just regard for the public safety should dictate to secure to the plaintiff's decedent a reasonable degree of safety in his proper and legitimate use of the crossing. The court can not say whether or not the crossing in question did require on the part of the defendant any particular appliances to safeguard the public or require any other measures than those taken by the defendant, but it is for

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you to determine from the evidence under all the circumstances of the case whether or not the defendant did take such measures at that crossing as common prudence demanded should be taken to secure the plaintiff's intestate when using said highway at the crossing in a reasonable degree of safety in his right to use the crossing, and in determining that question you have a right to take into consideration the condition of the crossing; its dangers; whether or not a flagman was stationed there; what obstructions there were, if any, to the view; whether or not signals were given, and all the facts and circumstances surrounding the crossing at the time; and if you find by a preponderance of the evidence that the defendant did not use such ordinary care in protecting the decedent at said crossing as common prudence dictated, such want of care on the part of the defendant would be a circumstance which you should consider in determining whether or not the defendant was guilty of negligence, and if you should find that it was the proximate cause of the death of plaintiff's intestate it would authorize you to return a verdict in favor of the plaintiff."

By this clause of the charge the court instructed the jury that if they should find that the crossing was an exceptionally dangerous one, then it was the duty of the company to keep a flagman at the crossing, or have some appliance to safeguard the public in the use of the crossing.

As we have stated this crossing was outside the city. The travel upon the highway was no greater than what is usual upon a country road. It was not within yard limits where there was a network of tracks, there being only the two main tracks; the railway company had done nothing to make this crossing exceptionally dangerous; it had placed no obstructions within the danger line interfering with the vision, and the trains were the ordinary through trains of the company. Under such circumstances we think the company was under no obligation to take further precautions than those prescribed by statute.

This case differs entirely from *Cleveland, C., C. & I. Railway Co. v. Schneider*, 45 Ohio St., 678. In that case the crossing was over a street in the city of Cincinnati; the street was in a populous part of the city and was generally traveled; there were a number of trains which were used for switching which added greatly to the danger of using the crossing. Of such character

also was the crossing in the case of *Grand Trunk Rd. Co. v. Ives*, 144 U. S., 408, referred to by counsel. We are of the opinion therefore in this case that the court erred in charging the jury that they might determine whether or not the company should have kept a watchman at the crossing or used some appliance to safeguard travelers at this crossing. Such was the holding of this court in *Lake Shore & Michigan Southern Ry. Co. v. Gaffney*, 9 C. C., 33, 45, a case involving this same crossing and which we are still inclined to follow.

Furthermore, the charge was very indefinite and uncertain respecting the subject of appliances. What were the appliances that should have been used to protect travelers? This question was left entirely to the jury. Each juror was left to determine what appliance should have been used. One would think this, and another that, until the conclusion is reached, that at least some appliance should have been adopted by the company. It is a matter of legislation usually when and what appliances should be used to safeguard travelers at a crossing, and to leave to the determination of jurors what appliances should be used would be very dangerous.

The next objection to the charge of the court is to that part of it where the jury is instructed as to the duty of Corlett to use his senses before attempting to cross over the track—the court said to the jury:

“Now as to the question whether or not Edward C. Corlett was guilty of contributory negligence. You are instructed that ordinary prudence requires that a person in the full possession of his faculties of seeing and hearing when approaching a known railroad crossing use his faculties for the purpose of discovering and avoiding danger from approaching trains, and his failure to do so without reasonable excuse therefor is negligence. It is his duty to use ordinary care under all the circumstances, and if his view was obstructed, that would increase rather than diminish the care which he should use; and as the decedent, Edward C. Corlett, when approaching said railroad crossing, was bound to use his senses, it was his duty to look and listen.”

That is to say, it was the duty of Corlett to look and listen without there was a reasonable excuse for his not doing so. The

instruction is practically the same as the first paragraph of the syllabus of the case of *Cleveland, C. & C. Rd. Co. v. Crawford*, 24 Ohio St., 631. It was proper in that case because the facts made it applicable, but in this case there was no evidence whatever that there was any excuse for not looking and listening for an approaching train before attempting to cross the tracks. As we have stated, for forty feet at least he had a plain view of the tracks and the approaching train for six or seven hundred feet. At the speed the train was running and he was traveling, had he looked at any time while he traveled that forty feet, he necessarily must have seen the approaching train. There was nothing to divert his attention. No other train approaching; nothing to the west; no one in his buggy; his horse going quietly along at a slow gait; no other traveler on the road, nothing whatever to excite him, or to cause him not to use his senses for his own protection. Why then say to the jury he should look and listen *without there was a reasonable excuse for his not doing so?* The charge simply suggested to the jurors to conjure up an excuse, to ransack their brains for an excuse, to imagine an excuse.

The jury was not instructed to examine the evidence to ascertain if there was an excuse and could not be so instructed, for there was no evidence. In this case the jury should have been told directly that it was the duty of Corlett to look and listen for an approaching train before attempting to drive over the tracks, and if the jury should find that by reason of his failure to do so he drove upon the track and was killed, then the plaintiff could not recover.

Abstract propositions of law should not be given to a jury when there is no evidence to make them applicable; the tendency is to mislead. The charge should be applicable to the facts so that the verdict will be responsive to the facts and the law. The facts in *Railroad Co. v. Crawford, supra*, were entirely different. In that case the train was hidden in a cut for a distance of two hundred feet until it got within a few feet of the crossing. Had the deceased looked he could not have seen the train upon entering the danger line. There were children in the carriage demanding his attention and other circumstances which might jus-

tify the jury in finding that there was a reasonable excuse for his not looking and listening. In this case there was no excuse shown at all and therefore the question of excuse had no application.

The court was asked in the seventh instruction requested by defendant's counsel to say to the jury, "It was the duty of Edward C. Corlett in approaching the tracks there to use his senses of seeing and hearing, and if he failed to do so, and such failure caused or contributed proximately to his injury, plaintiff can not recover." This request was refused. It should have been given, or the jury charged to the same effect.

The next question made is that the court erred in its charge respecting the duty of the engineer in ascertaining the perilous position of the deceased and preventing the injury. In the charge the court practically told the jury that if the engineer by the exercise of ordinary care could have seen the deceased and known of his perilous position, and thereafter by the exercise of ordinary care could have stopped the train, or so far checked the speed thereof as to have prevented the injury, and such failure was the proximate cause of the injury, then they should find for the plaintiff. In other words, if the engineer by the exercise of ordinary care could have or should have known of the perilous position of plaintiff's intestate, and thereafter by the exercise of ordinary care could have prevented the injury, then the company would be liable notwithstanding his own negligence.

Two objections are made to this portion of the charge: First, that there is no evidence whatever upon which to base it; and, second, that as an abstract proposition it is wrong. We are of opinion that both objections are well taken.

Plaintiff below called the engineer as a witness in his own behalf, and he testified that the first he saw of the decedent he was about fifteen feet from the track driving toward the same, giving no attention whatever to the approaching train; that his train was running at a speed of about fifty miles an hour; that he immediately sounded the danger signal, but before he could apply the air to the brakes, he struck the horse and buggy of the decedent. There was no contradiction of this evidence and there-



fore there was nothing to justify this portion of the charge of the court.

It is well settled that for the court to instruct the jury that they shall pass upon a fact that is material in the case as this was when there is no evidence at all to support it is misleading and such error as will require a reversal of the judgment. Independent of this fact can this portion of the charge be held to be good upon any theory? It is true that this portion of the charge is supported by the holding in *Lake Shore & M. S. Ry. Co. v. Schade*, 15 C. C., 424, nevertheless we must hold it to be erroneous. The proposition simply amounts to this, that if a traveler on the highway negligently drives upon the track, and the servants of the railway company by the exercise of ordinary care could or should have known of his perilous position in time to save him by the exercise of ordinary care, then the company is liable. We can not subscribe to this doctrine.

It is well settled that if the employe did know of the perilous position of the traveler, then he must exercise ordinary care in checking or stopping the train. Both the dictates of humanity and the law would require that. Indeed, he should do more; he should make every possible effort to check or stop the train, and if he did not do so it would be willful negligence. But to say, if the engineer did not know but might have known, in other words, if the engineer did not look and plaintiff's intestate did not look, both guilty of negligence, then plaintiff could recover, would be a paradox in law. It can not be claimed that the negligence of one is any more the proximate cause than the other; the negligence of each is in not looking, when if he had done so he might have ascertained the danger. If the train had been derailed and injury followed, would the company have had a right of action against the estate of the deceased as the estate had a right of action against the company? It is said that the case of *Cincinnati, H. & D. Rd. Co. v. Kassen*, 49 Ohio St., 230, sustains the contention of plaintiff in error. We do not think so. The facts of that case show that the company through its servants had actual knowledge that Kassen was upon the track, as he had fallen from one of the trains of the company about two hours before his death, while the train was in rapid motion, and

was killed by being run over by another train, the crew of the first train doing nothing whatever to ascertain the result of his fall or to inform the crew of the other train of the accident.

In the third paragraph of the syllabus of that case, the court says:

“The rule that the negligence of the injured party which proximately contributes to the injury, precludes him from recovering, has no application where the more proximate cause of the injury is the omission of the other party after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him.”

It is said, however, that the case of *Railway Co. v. Schade*, *supra*, was affirmed by the Supreme Court. So it was, but without report, 57 Ohio St., 650. Upon what grounds we are not informed. It may have been for some reason distinct from the one under consideration. If we were sure that the fourth proposition of the syllabus of that case was approved by the Supreme Court we would be bound by it and would follow it, but we can not bring ourselves to the conclusion that such is the fact in the light of another case subsequently decided by the Supreme Court with report. In *Lake Shore & M. S. Ry. Co. v. Ehlert*, 19 C. C., 177, this same question again came before the circuit court of the eighth circuit and the same holding was made, the first, second, third and fourth paragraphs of the syllabus being as follows:

“1. It is negligent for a person having approached a railway crossing where the gates have been lowered, to stand, while waiting for a train to pass on one track, in such close proximity to another track on which trains are known to be operated, as to be within reach of a passing train, or to attempt to walk across the tracks after the gates are lowered.

“2. Although a person may have been guilty of negligence in placing himself in a dangerous position, in which he was liable to be injured by passing trains, yet if the employes of the railway company in charge of an approaching train knew of his danger, or might have known by the exercise of ordinary care, in time to protect or save the life of such person, the negligence of the railway is the proximate cause of the injury and a recovery may be had.

“3. In an action for wrongful death, where the evidence clearly shows that deceased, having approached a railway cross-

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ing after the gates were lowered, took a position so near another track as to be within reach of a passing train, and that he remained in that position until he was killed, and the evidence also shows that the employes of the railway company in charge of the train saw him, or could by the exercise of ordinary care have seen him for a distance of 150 feet from where he was killed, the rule stated in the preceding paragraph may be applied; and the question in such case, whether the railway company was negligent in failing to sound the whistle in time to warn deceased of his danger and save his life, was properly submitted to the jury, although deceased was guilty of negligence in getting near or on the track.

"4. The rule that a recovery may be had where defendant's negligence was the proximate cause of the injury, notwithstanding contributory negligence upon the part of plaintiff's decedent, should be given with great caution; in many cases, where the time for action is short, and the principle is so vague and uncertain, it would be misleading, but under the facts stated in the preceding paragraph it was properly given."

In this last case the court justifies its holding on the authority of *Lake Shore & Michigan Southern Railway Co. v. Schade*, *supra*. This last case also went to the Supreme Court (*Lake Shore & Michigan Southern Railway Co. v. Ehlert*, 63 Ohio St., 320), and the circuit court was reversed, so that we are at least in doubt as to what is the holding of the Supreme Court upon the question, and being in doubt, we can not subscribe to the rule laid down in *Railway Co. v. Schade*, *Administrator*, and *Lake Shore & Michigan Southern Railway Co. v. Ehlert*, *supra*.

The last question made is, that the verdict was manifestly against the evidence. As we have before stated, the unquestioned facts are that plaintiff's intestate could have seen the approaching train while he was forty feet from the tracks of the railway company and while the train was at a distance of nearly eight hundred feet; that he could have seen the train all the time while he traveled that forty feet, at the rate of speed the train was going and he was traveling. The train, therefore, was in full view for a considerable space of time, an abundance of time for him to have stopped his horse. There was nothing to divert his attention in either direction. All the evidence we have shows

that he did not look at all, and that with the curtains down he drove deliberately upon the tracks of the company.

How can it be said under these circumstances that he exercised due care and that the verdict of the jury is justified by the evidence? The judgment of the court below must be reversed upon that ground also. For these reasons the judgment of the common pleas court is reversed and the cause remanded for a new trial.

*Theodore Hall*, for plaintiff in error.

*A. G. Reynolds, Bosworth & Hannan* and *C. W. Osborne*, for defendant in error.

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#### POWER IN EXECUTORS TO SELL.

[Circuit Court of Hamilton County.]

ELIZABETH SCHAUPP ET AL V. THOMAS JONES ET AL.

Decided, June 20, 1902.

*Will—Title to Real Estate, Proceeds from the Sale of Which is Devised—Sale May Be Avoided, How—Implied Power in the Executors to Sell.*

1. Where a testator provides that land shall be sold and the proceeds thereof divided equally among four persons, no one of the devisees acquires title to the property under the will, but the devisees might, by all uniting, avoid a sale by the executor, and take the premises instead of the proceeds therefrom.
2. The power to sell land and distribute the proceeds to devisees in accordance with the will is a power that may be inferred from the expression in the will, "firmly believing they (the executors) will carry out the directions of my will," in the absence of express power thereunto.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The plaintiffs in error claim title to an undivided one-fourth interest in certain real estate under the following provisions of the last will and testament of Benedict M. Mueller:

"My house in Cincinnati, 608 Fulton avenue (which I inherited from my dear late father, Nicholas Mueller, to be sold and the proceeds likewise to be divided into four parts, to-wit:

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First part to St. Rosa's Catholic Church in memory of deceased parents and myself. Second part to my brother, Andrew Mueller, or in case of his death, to surviving family. Third part to Most Rev. Archbishop Elder, or his successor, in favor of orphans of the diocese. Fourth part to my cousin, Mrs. Elizabeth Schaupp (nee Gebhart) or (in case of her death) to her children. Benedict M. Mueller.

"P. S. I, as executor of this will, appoint Rev. B. H. Engbers, Ph. D., of Cincinnati, and Edward Powell, of West Jefferson, Ohio, without bond, firmly believing that they will fully carry out the directions of this will."

In the first place, Elizabeth Schaupp acquired no title to the real estate under the will, as the gift was a bequest of money, and although all of the legatees might, by uniting in the request, have avoided a sale by the executor and taken the premises instead, still no one of them could alone do so.

The executor having sold the house and lot, it is claimed that he did so without authority. There is no express authority conferred upon the executor to sell or divide the proceeds of sale of either the personal or real property, and after signing the will it evidently occurred to the testator that he had appointed no one to carry out his will. Hence in making the appointment he uses the language, "firmly believing that they will fully carry out the directions of this will." While these words do not amount to a command or direction to the executors, they express the wish and desire of the testator that the person so appointed shall execute the will as he directs. In other words, they express such intention on the part of the testator.

We think, therefore, that the judgment should be affirmed.

*Arnold Speiser and David P. Schorr*, for plaintiff in error.  
*Charles T. Dumont*, contra.

**HOMESTEAD EXEMPTION.**

[Circuit Court of Ashtabula County.]

F. R. SIMMONS ET AL V. ADMR. OF SARAH J. MOORE ET AL.

Decided, October Term, 1897.

*Homestead—Exemption in Lieu of, May be Allowed on Distribution—  
Where a Debtor Has Placed Himself in Position to Demand It—  
Subsequent to the Order for Sale—Such Action not a Fraud on  
Creditors—Exemption Superior to Judgment Liens.*

1. A court has authority to grant or refuse an allowance in lieu of homestead, upon an application made subsequent to the fixing of priorities and issuing of the order for sale, the determination upon the application to depend upon the circumstances existing at the time of distribution.
2. It is not a fraud upon his creditors for a debtor by marrying to put himself in position to demand an allowance in lieu of homestead.
3. Marriage having occurred, and demand for homestead exemption having been made and allowed subsequent to the decree fixing the amounts and priority of liens, the allowance for homestead becomes superior to the judgment liens, and the lienholders take that much less.

FRAZIER, J.; LAUBIE, J., and BURROWS, J., concur.

Heard on error.

Proceedings in error are prosecuted by F. R. Simmons and others, claiming to have liens by reason of levies made after the death of Sarah J. Moore on executions issued on judgments against A. U. Moore.

A. U. Moore, as administrator of his wife's estate, commenced proceedings in the probate court for the sale of the real estate of his deceased wife. It is an uncontroverted fact that Mrs. Moore was insolvent at her decease.

The administrator made not only himself, as heir, but the mortgagees of his wife parties, and averred that certain other parties claimed an interest in these premises, as creditors of the surviving husband, who was also administrator.

The case was disposed of in the probate court, which, under our statute, had full jurisdiction in the matter and authority to determine the validity and priority of the liens. The case

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was then appealed to the court of common pleas and was submitted in that court upon an agreed statement of facts. The case was disposed of by the learned judge of the court of common pleas, and his opinion is published in *Moore v. Moore*, 6 Dec., 154. We only propose to remark upon such matters as are urged in this hearing as do not appear to be directly alluded to in that opinion.

By the agreed statement of facts, it is shown that A. U. Moore received an order of sale from the probate court in this proceeding for the sale of all of the real estate of which Sarah J. Moore died seized on November 18, 1895, and that on said date he received an offer for tract 1 of said property from Richards Brothers, to purchase said tract for \$3,500, the appraised value thereof.

That on March 14, 1896, the defendant Moore was remarried, and since that date has been a married man, the head and support of a family; that he is a resident of Ohio, and neither he nor his wife own a homestead.

That on March 19, 1896, he accepted the offer of said Richards Brothers for said tract 1, and reported to the probate court the sale, which was confirmed and deed made and delivered, and said \$3,500 paid.

That on August 26, 1895, the creditors of A. U. Moore caused executions to issue and they were levied and return made by the sheriff:

"No goods or chattels of the within named A. U. Moore being found to levy, I did, on the 26th day of August, A. D. 1895, at the hour of two o'clock P. M., levy the annexed writ upon the following described real estate (describing the same real estate described in the petition filed by the administrator to sell lands in the probate court in this case). No further proceedings by me under and by virtue of the annexed writ and the same is returned: No money made, not satisfied."

It is now inquired, what was brought into the court of common pleas by the appeal, and it is urged that the order and finding in the probate court, upon which the premises were sold, was not appealed.

One thing I apprehend is certain: There can be no question but the order of distribution in this case was appealed from.

The appeal was perfected within the time prescribed by statute from the making of that order.

It is contended that the finding of the amount due each creditor, and the priorities, is in effect a judgment, and the finding that the creditors of A. U. Moore had obtained liens upon his dower interest by their levies not being opened up by the appeal, the proceeds of sale must be distributed as there found. We think the same rule prevails in this action, as would prevail in an ordinary proceeding to foreclose a mortgage, where other mortgagees and judgment creditors are made parties to marshal liens, and a finding of amount due each, and the priorities, with an order to sell to satisfy the sums found due. If a party is found to be entitled to an exemption in lieu of a homestead under Section 5441, Revised Statutes, it is not necessary to change the findings and order of sale. The mere fact that a lien exists does not bar the right to an allowance of homestead or exemption in lieu of it. It is allowed because in law the debtor's right to it is a higher and better right, a right more favored and superior to a judgment lien.

In *McConville v. Lee*, 31 Ohio St., 447, 450, it is said:

"Nor can it make any difference that previous to the sale, an order had been made that the proceeds of the sale should be applied first in payment of costs, then in satisfaction of the mortgage debt, and then in satisfaction of the judgment. The decree in that respect was within control of the court until there was actual distribution."

The only effect, so far as creditors are concerned, is that there is that amount less to distribute under the order, and they are affected just as they would have been had the premises been sold for that sum less than it brought. A lien may exist, but it is only valuable to the lien-holder if the property is not consumed in payment of prior liens or superior claims.

The demand for exemption was made by motion filed in the probate court on the day before sale. The court has authority to make or refuse an allowance under Section 5441, Revised Statutes, out of the proceeds of sale, as warranted by the facts or changed circumstances of the parties, as they exist at the time the surplus is disposed of.



The order appealed from and in question here is only the right of A. U. Moore to have an allowance in lieu of a homestead.

The authorities appear numerous upon the question to which I have referred, especially *Niehaus v. Faul*, 43 Ohio St., 63, where it is held:

“The right to demand an allowance in lieu of a homestead under Section 5441, Revised Statutes, out of the proceeds of the second sale, is to be determined by the state of facts at the time the surplus arising from such sale was finally disposed of by the court.”

It is claimed also that it was a fraud upon the creditors for him to get married, and put himself in a state to make a demand in lieu of a homestead. We have upon that subject the case of *Mortley v. Flanagan*, 38 Ohio St., 401, the syllabus of which is:

“Where the members of a firm acting in good faith, dissolve the partnership, and one member sells his interest in the partnership property to the other, the latter will not be deprived of the right to hold such property exempt from the payment of a debt thereafter asserted against him, on the ground that such debt was a partnership debt due at the time of the dissolution, nor will the fact that the partners knew the firm to be insolvent at the time of such dissolution make any difference. *Gaylord v. Imhoff*, 26 Ohio St., 317, distinguished.”

Judge Okey, in the opinion, comments as follows:

“The denial in the reply seems to be as broad as the averments in the answer; but if we construe the reply as admitting that one of the reasons which induced the dissolution and the sale to A. C. Flanagan was to enable him to claim an exemption from execution, the result would be the same. A sale fairly and honestly made by one member of a firm of his interest in the partnership property and effects to the other partner, will not be rendered invalid by the fact that it was expected such partner would thereafter avail himself of the provisions of the statute to hold such property exempt from execution. Such a purpose where the purchase is *bona fide* is not the subject of averment or proof.”

If it is a fraud for a man to put himself in a position to demand a homestead, the whole right to have a homestead would be a fraud.

Having said this much we are content to affirm this case on the other questions made in the record, upon the reasoning of Judge Howland in *Moore v. Moore*, *supra*. Judgment will be affirmed with costs; no penalty.

*Hoyt & Munsell*, for judgment creditors.

*G. W. Belknap* and *C. A. White*, for U. A. Moore.

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### AGREEMENT AS TO ATTORNEY'S FEES.

[Circuit Court of Hamilton County.]

HARVEY MEYERS v. MOLLIE F. PEARCE.

Decided, August 11, 1902.

*Attorney's Fees—Strict Proof Required to Establish a Change of Contract as to the Amount to be Paid.*

Where an attorney claims a change of contract was made as to the amount he was to receive for his services in a given matter, the burden is upon him and strict proof will be required, notwithstanding by a *quantum meruit* he would receive a much larger amount.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

It appears from the record that Harvey Meyers rendered services to Mrs. Pearce, of great ability, courage and value, and that the same were successful, and if it were a question of *quantum meruit* the amount of the alleged contract would be inadequate and the amount retained by him reasonable. But that is a matter with which we are not concerned if there was a subsisting contract between Mr. Meyers and Mrs. Pearce.

Mrs. Pearce says Mr. Meyers undertook to do this work for \$500.

Mr. Meyers says that the \$500 contract was subsequently by agreement abrogated. The burden of showing this change is on Mr. Meyers, and it is to the credit and dignity of the legal profession that the measure of proof required by law is strict. It may even be that Mr. Meyers is right in this contention, but it is better that he should fail for want of sufficient proof than that there should be any relaxation in this regard. However

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this may be, this issue was fairly submitted to the jury under a proper charge and we can not say that the verdict is so manifestly against the weight of the evidence as to call for a reversal.

Judgment affirmed.

*Harvey Meyers, pro se.*

*Hallam & Terrill, contra.*

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**CONTRACT FOR THE EXCLUSIVE SALE OF A PATENTED  
ARTICLE.**

[Circuit Court of Lucas County.]

THOMAS VAN TUYL V. HOMER J. YOUNG ET AL.\*

Decided, October 19, 1901.

*Damages—Provision for a Liquidated Sum—Not as Penalty but as Compensation Will be Enforced—Contract for Payment of Royalties—Measure of Damages for Failure to Carry Out—Such Failure Does Not Work a Rescission.*

1. Where the measure of damages is provided for in the contract, and the damages are liquidated, and the sum to be paid is not in the nature of a penalty, but in the nature of a compensation agreed upon between the parties, it is the policy of the courts to uphold and enforce the agreement in that behalf.
2. The failure of one of the parties to a contract to perform his part does not operate *ipso facto* to work a cancellation. It may give to the party not in default a right to rescind, but that option is not a privilege of the one defaulting; and where the contract contains no condition upon which there shall be a forfeiture, but simply a provision for cancellation, some positive fact amounting to an absolute rescission and tender of the amount due, is necessary to terminate the contract.
3. Under the contract in suit, granting the exclusive right to make and sell handle bars for bicycles, the measure of damages for its breach is the royalty upon the minimum production provided for in the contract, notwithstanding no handle bars were made or sold.

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\*Affirmed by the Supreme Court without report, March 8, 1904. °

PARKER, J.; HAYNES, J., and HULL, J., concur.

In the court below the parties stood as they do here, Van Tuyl being plaintiff and Young and another being defendants. The action was brought upon a written contract and bond. The contract is not very long, and I will read it:

"This contract made and entered into this 16th day of September, 1898, by and between Thomas Van Tuyl, of Nicholas, Iowa, party of the first part, and H. J. Young, of Toledo, Ohio, party of the second part, witnesseth:

"That whereas the said H. J. Young is about to conduct an enterprise for the manufacture and sale of a certain patented bicycle handle bar, which patent was issued to the said Thomas Van Tuyl under date of May 10, 1898, and under the title of the "Van Tuyl Double Adjustable Bicycle Handle Bar," whereby the said Thomas Van Tuyl (patentee) is to receive as such patentee a royalty on each and every Van Tuyl adjustable bicycle handel bar so manufactured and sold by H. J. Young, his successor or assigns, as hereinafter set out.

"The said Thomas Van Tuyl hereby awards to said H. J. Young, his successor or assigns, the sole and exclusive right to manufacture and sell the aforesaid patented handle bar, protected by letters patent to said Thomas Van Tuyl from the U. S. Patent Office granted May 10, 1898, and numbered 603,671, and all patented improvements on the said handle bar which the said Van Tuyl may hereafter invent or acquire for and in consideration of a royalty for the manufacture and sale of said handle bar as herein set out.

"The said H. J. Young, his successors, legal representatives or assigns, agrees in consideration for the sole and exclusive right and privilege to so manufacture and vend the said handle bar as above set out and described, to pay or cause to be paid the said Thomas Van Tuyl, his legal representatives or assigns, a royalty of ten cents on each and every handle bar for the first 10,000 so manufactured and sold; and a royalty of five cents thereafter on each and every handle bar in excess of 20,000 so manufactured and sold by the said H. J. Young, his successors and assigns. Said royalty to be due and payable on the first day of each and every month for all handle bars manufactured and sold the previous month."

[It seems to us that the word "twenty" there is probably inserted through mistake; the word "ten" must have been intended. We could not otherwise reconcile the terms of the

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contract. However, it is not very material to the question we have submitted to us].

“The said H. J. Young, for himself, successors or assigns, further agrees hereby to manufacture and sell not less than 10,000 of aforesaid handle bars on or before the 1st day of September, 1899, and to manufacture and sell not less than 10,000 each succeeding year thereafter, or so long as said H. J. Young shall continue to so manufacture and sell said handle bars after the 1st day of September, 1899, or surrender and cancel this contract.

“The said Young, his legal representatives or assigns, hereby further agree to manufacture the first 1,000 handle bars before the 1st day of February, 1899, or cancel this contract, and whether manufactured or not to be liable to said Van Tuyl, his legal representatives or assigns, for the royalty of ten cents each upon said 1,000 handle bars.

“Said H. J. Young for the faithful performance of the above and foregoing conditions to be by him kept and performed, hereby further agrees to execute and deliver to the said Thomas Van Tuyl his good and sufficient bond in the sum of \$1,000, signed by at least one resident freehold security, and approved by said Thomas Van Tuyl, which bond shall be holden until the 1st day of September, 1899. That each year thereafter from the date last above mentioned the said H. J. Young shall execute and deliver a like bond in the sum of \$500, so long as he or his successors shall manufacture and sell said handle bar.

“It is further agreed by the said H. J. Young that should he desire to continue to so manufacture and sell said handle bars after the said 1st day of September, 1899, he shall give notice to the said patentee at least thirty days prior to the 1st day of September, 1899, and a like notice each year thereafter, so long as the said H. J. Young shall continue in said manufacture and sale of said handle bars.

“It is further agreed by and between all parties hereto that the said Thomas Van Tuyl shall at all times have free and undisputed access to the books of said H. J. Young, his successor or assigns, for the sole and only purpose of ascertaining the number of said handle bars so manufactured and sold.

“It is further understood and agreed that this contract shall be binding and in effect from and after the 16th day of September, 1898, on which date said H. J. Young shall sign this contract and furnish to said Van Tuyl a bond (which bond is hereby made a part hereof in conformation with the above and foregoing conditions in the sum of \$1,000 for the faithful performance of the same).

"This contract to be in duplicate and when properly signed and bond furnished, each party to have a copy of the contract and the same to be in full force and effect thereafter.

"Signed in duplicate this 16th day of September, 1898. (Signed by the parties, and witnessed, and acknowledged before a notary public)."

And the bond reads:

"Know all men by these presents, that we, H. J. Young, as principal, and E. D. Hubbell, as surety, of the county of Lucas and state of Ohio, are held and firmly bound unto Thomas Van Tuyl in the penal sum of \$1,000, for the payment of which and truly to be made we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

"Sealed with our seal and dated this 16th day of September, 1898.

"The condition of the above obligation is such, that whereas, the above bound H. J. Young, of Toledo, Ohio, on the 16th day of September, 1898, entered into a contract with Thomas Van Tuyl, of Nicholas, Iowa, for the sole and exclusive right to manufacture and sell a certain patent handle bar known as the Van Tuyl Double Adjustable Bicycle Handle Bar, and protected by letters patent number 603,671 of the patent office of the U. S., and paying the said Van Tuyl a royalty on each and every handle bar manufactured and sold under said patent a certain specified royalty.

"Now, therefore, if the said H. J. Young shall do and perform all the stipulations and conditions of said contract to be by him kept and performed, then this obligation shall be null and void; otherwise to be and remain in full force and effect in law.

"Witness our hands and seals this 16th day of September, 1898." It is duly executed.

In the court of common pleas the plaintiff recovered a judgment for \$100, with interest from February 1, 1899. The prayer of the petition was for judgment for \$1,000 and interest.

The plaintiff contended that the measure of damages for the default alleged was fixed by the contract at ten cents each upon 10,000 handle bars that should have been manufactured during the year, and that the damages, therefore, to which he was entitled amounted to \$1,000. He filed a motion for a new trial upon the ground that the verdict was against the law and the evidence, *i. e.*, that the award of damages was too small.

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It appears from the bill of exceptions that the defendant, Young, did not enter upon the manufacture of these handle bars at all. He never manufactured any of them. Sometime in the fall of 1898 he began to correspond with the plaintiff with a view of effecting a rescission of the contract, but the terms of his proposal were not accepted by the plaintiff.

It is set forth in the bill of exceptions that—

“It is admitted by the plaintiff and the defendants that no handle bars were manufactured or sold by the defendants, Homer J. Young or Edward P. Hubbell, in pursuance of the contract hereto attached, marked plaintiff's exhibits Nos. 1 and 2, and that no royalty was paid by the defendants to the plaintiff.”

There was no averment or evidence that the plaintiff had manufactured or sold any handle bars, or that anyone else for him had done so during the year. The plaintiff did not introduce any evidence of any damages that he had suffered by reason of the failure of the defendants to manufacture and vend the handle bar, relying upon the terms of the contract as providing not only the measure of damages, but as liquidating the damages, stating the amount definitely; that is to say the minimum amount that he would be entitled to recover.

A jury was waived in the court below, and the case was submitted to the judge, and it is evident from the amount of his award of damages that he did not sustain the contention of the plaintiff in error, but that he regarded the provision in the contract that “The said Young, his legal representatives or assigns, hereby further agrees to manufacture the first 1,000 handle bars before February 1, 1899, or cancel this contract, and whether manufactured or not, to be liable to said Van Tuyl, his legal representative or assigns, for the royalty of ten cents each upon said 1,000 handle bars,” as being the only provision which fixed the measure of damages in the event that the handle bars were not manufactured and sold, and as being the only provision for liquidated damages.

The question presented, it will be observed, turns entirely upon the construction to be placed upon this contract. We are

unable to agree with the conclusions of the learned judge of the court below. We are of the opinion, looking at the whole contract, and reading it in the light of the purposes to be served by it, that the proper construction to be put upon it is, that if Young held on to the privileges thereby conferred upon him beyond February 1, 1899, that is to say, if he did not cancel and surrender the contract before that time, he would be bound to manufacture and sell and pay royalty upon 10,000 handle bars, or if he did not manufacture and sell them, nevertheless to pay a royalty for the year upon the 10,000 handle bars that he agreed to manufacture and sell during the year. If he manufactured and sold 10,000 handle bars, he would be required to pay the royalty of ten cents each thereon; if he manufactured and sold more than 10,000, he would be required to pay a royalty of ten cents each upon the 10,000, and a royalty of five cents each upon any in excess of 10,000, assuming that the word "twenty" to which I referred was inserted by mistake, and that it should read "ten." We believe this is the true construction of the provision on the subject of royalties, in the light of other provisions of the contract, especially in the light of the provisions respecting the bond required.

It is apparent that if a distinct measure of damages had not been provided in the event of a failure to perform, by the manufacture and sale of the handle bars, it would be difficult, if not impossible, to arrive at a true and just measure of damages. It is also apparent that it would be important to the patentee, who conferred this exclusive right upon the manufacturer, that the handle bars should not only be manufactured and put upon the market, but that such number should be manufactured and put upon the market as would bring to him some reasonable return, in consideration of his having surrendered to the manufacturer the exclusive right to manufacture and vend for the period stated. It is apparent, too, from the correspondence itself, that it would not have been feasible for the patentee to accept a surrender of this contract after the first day of February of any year, and then undertake to enter into a new arrangement, either for the manufacture and vend



ing of the article himself, or with another manufacturer to do so, because the season after that would be so far advanced that it would be impracticable to place the handle bars upon the market during the season. And it seems to us, looking over the whole contract, that this contingency is provided for in the clause which I have just read. That seems to us to be a definite provision that the right of cancellation which is given to the manufacturer is limited, for the initial year, at least, to February 1, 1899. And we think that it should be and is the policy of the courts, where the measure of damages is provided for in the contract, where the damages are liquidated, where the sum to be paid is not in the nature of a penalty, but in the nature of a compensation agreed upon between the parties to uphold and enforce provisions of that character.

In the clause immediately preceding that which I have just read the matter of surrender and cancellation is mentioned, but in our judgment the cancellation there provided for has reference to other provisions of the contract for years subsequent to September 1, 1899; that is to say, if the defendant should not desire to manufacture during any succeeding year, and failed to renew the contract by giving the notice and bond provided for other years, that then he should surrender and cancel the contract. This does not say that the failure to give such notice and bond would necessarily operate as a cancellation of the contract. The contract, by its terms, is adequate for future years. It provides for other years succeeding September, 1899. And the patentee, Mr. Van Tuyl, might have waived the notice provided for in the contract, and might even have waived the bond provided for in the contract, and if the defendant had gone ahead and manufactured, VanTuyl would have had a right, notwithstanding the failure to give notice and bond, to consider and hold him as manufacturing under and in pursuance of this contract, and to require him to pay the royalty provided for by the contract. It would not be within the power of the defendant to effect a cancellation or abrogation of this contract simply by failing to perform certain conditions of the contract imposed upon him.

It was contended in argument that since Young had failed to manufacture any handle bars, he had forfeited his rights under the contract; that the contract had *ipso facto* become inoperative; that it had been annulled with respect to all its provisions, excepting those as to the manufacture of 1,000 handle bars up to February 1, 1899. A right of cancellation was given to Mr. Young, but cancellation requires some positive act. A failure to perform the contract on the part of Young would not *ipso facto* operate to work cancellation. It might give to the patentee, Mr. Van Tuyl, not in default, a right to rescind and annul the contract; but that option would be in Mr. Van Tuyl, and not in the party in default. In this respect the principle of forfeiture is similar and applicable; and upon that head I read from a case that was cited in argument—*Woodland Oil Co. v. Crawford*, 55 Ohio St., 161. I read from the opinion by Judge Burket:

“This case arose upon an oil lease which contained a provision that—

“ ‘A failure on the part of U to complete such well or wells as above specified, or instead thereof to pay the rental as above provided, shall render this lease and agreement null and void, together with all rights and claims, and not binding on either party, and not to be revived without the consent of both parties hereto in writing.’ ”

The lessee having failed to perform, either by the driving of the well or by paying rental, when he was called upon to respond in damages, answered that by the terms of the lease his failure to perform had abrogated the agreement. Judge Burket very tersely and emphatically disapproves of that proposition:

I read from pages 176 and 177:

“The principal contention in this case arises upon that part of the lease which provides that a test well should be drilled within one year, and in default, payment of a yearly rental of \$128 for further delay, and a further provision that a failure to drill the test well, or pay the rental, should render the lease null and void, and not binding on either party, and not to be revived without the consent, in writing, of both parties.

"It was this provision that was relied upon in the demurrer to the amended petition, and in the third general defense in the answer of the oil company.

"Reduced to its essence, this is a promise to in writing, upon sufficient consideration, to pay a yearly rental of \$128 for the right to use, to a limited extent, certain premises, with a further provision in the same instrument, that a failure to pay should discharge the debt; that a default of payment should be the equivalent of payment; that failure should be performance; that non-payment should be payment.

"Such contradictions in like instruments have caused the courts to look critically into such instruments to ascertain the real intention of the parties, because such contracts can not be enforced according to their letter. A promise to pay can not be fulfilled by a failure to pay. A promise to drill a well can not be satisfied by a failure to drill such well. The proper construction to be placed upon such an agreement is, that upon failure of the lessee to drill a well, or pay the rental, or both, as the case may be, the lessor may elect to put an end to the lease, and enforce payment of the promised rental, or sue for damages for failure to drill the well, or he may elect to have the lease continue in force to the end of the term, and enforce the drilling of wells and the payment of rentals, as provided in the lease. Such provisions of forfeiture are for the benefit of the lessor, and not for the benefit of the lessee. The lessee can not plead his own default or wrong in discharge of his obligation to drill or pay rental."

The contract under consideration here has no such express provision, and, besides, it contains no condition upon which there shall be a forfeiture, but simply a provision for a cancellation, which, as I have said, requires a positive act—something more than a mere failure to perform; and we think the principles enunciated in the case from which I have just read apply with full force to the case under consideration and to the argument advanced in support of the proposition that the failure to perform operated to cancel the agreement.

It is contended on behalf of the defendant in error that Young did exercise his right to cancel the agreement. It will be observed that it is very clearly and distinctly provided in the agreement that Young shall be liable for at least \$100, whether he manufactures any handle bars or not. About that

counsel make no question. As I have said, we hold that the provision as to cancellation was limited to February 1, 1899. There was some correspondence upon the subject of putting an end to this agreement, and it is upon that correspondence that the defendant in error relies to show that the cancellation was effected. I need not read all of it. The first letter referring to the matter of putting an end to the contract is dated November 29, 1898. It reads:

“MR. THOS. VAN TUYL,

“Nicholas, Iowa.

“*Dear Sir:* I write you to-day in regard to your double adjustable handle bar which has been absorbing my attention more or less for the past month, and at this time can not see my way clear to do you justice upon your bar for the coming season. Our Mr. Hubbell and myself had about concluded a deal whereby one of the largest jobbing houses in the bicycle sundry and fittings line would dispose of the output for us, but the deal, up to this time, has not been consummated, and they report to us that they have got more than they can do this season upon their regular line. We are also in a similar condition ourselves with our own business here, and it is taking so much of our time and attention that it is impossible for us to do your handle bar justice. I therefore wish to state if you will kindly release me and Mr. Hubbell as my surety, in regard to contract entered into, I will surrender and deliver contract to you. I believe that this will certainly be to your advantage, because it will be necessary to do considerable preliminary work even for the coming year, and it will now enable you to prepare yourself in plenty of time for the retail trade for next season; and introducing a bar of this kind, it will be almost impossible to force it onto the manufacturer or jobber before you have done your preliminary work with the retailer. I therefore verily believe that you should take hold of it and put it on the market this season.

“I have regretted very much my inability to give it proper attention and was in hopes to tie up with some concern who would handle the output for this season and give it a name in the trade.

“Enclosed please find release of contract, which I would ask you to kindly sign and return, and will forward to you tools and bars now in our possession. I believe you will consider this the best thing to be done in the premises, and let the contract

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revert back to you. Therefore, if you will kindly send in your release, we will act very promptly."

And in connection with that appears a release, which we understand is a copy of the one which went forward with the letter (though it contains the date of December 6, 1898), which reads:

"MR. H. J. YOUNG,  
"Toledo, Ohio.

"*Dear Sir:* In consideration of your surrendering contract between us dated September 16, 1898, to me, for the control of U. S. letters patent No. 603,671, I hereby release you and your surety from all obligations thereunder.

"Very truly yours."

That was to have been signed and returned by Mr. Van Tuyl. The answer that Mr. Van Tuyl made does not appear in the record, but it is apparent from other letters by Mr. Young and Mr. Hubbell that he did not accept this proposition. There is more correspondence along that line—more letters—before February 1, 1899, in which this proposition to rescind is repeated. Then on June 2, which was after the time, according to our construction of the contract, within which Mr. Young might have cancelled this contract and surrendered it, he writes as follows:

"MR. THOS. VAN TUYL,  
"Nicholas, Iowa.

"*Dear Sir:* Please take notice that on November 29, 1898, I did by letter cancel and surrender all my right, title and interest that I had or might have acquired in and to a certain contract, dated the 16th day of September, 1898, between you (Thomas Van Tuyl, Nicholas, Iowa) and myself (H. J. Young, of Toledo, Ohio), in regard to a patented adjustable handle bar; and I hereby again notify you that I do relinquish all my right, title and interest in and to above contract, and I hereby surrender my original copy of said contract, and send the same by mail to you to-day.

"Very truly yours,

H. J. YOUNG."

And accompanying that was his copy of the contract with the words "Canceled November 29, 1898," written upon it. When

that was written upon it does not appear, but according to our construction of these letters and these acts, the statement that he had, upon November 28, 1898, canceled the contract and surrendered his rights under it, was incorrect. He had simply proposed a rescission upon the terms that his obligation to pay \$100 should be canceled and released—a proposition that Mr. Van Tuyl was not required to accept, and that he steadfastly refused to accept. We do not think that it would have been necessary for Mr. Young to have paid \$100 as a condition precedent to exercising his right to cancel; but he might have canceled absolutely, if he had done so before February 1, 1899, and then Mr. Van Tuyl would have been compelled to enforce as best he could the obligation of Mr. Young and his bondsmen to pay \$100. But Mr. Young did not attempt to exercise that right. He was seeking to save the \$100 and to obtain a rescission of the contract by agreement with Mr. Van Tuyl. The situation was this: Up to the second of June Mr. Van Tuyl had declined to accept this proposition to rescind the contract and put an end to the rights conferred upon Mr. Young under this contract—the exclusive right to manufacture and vend was still in Mr. Young. Mr. Van Tuyl had no right, upon the mere submission of this proposition, or unless he accepted it and released Mr. Young from the obligations under the contract to manufacture and vend handle bars, or to confer the right upon another. The exclusive right to make and vend the handle bars was in Mr. Young, and remained in him. Mr. Young said that he would relinquish it; that he would surrender the contract if the obligation to pay \$100 were surrendered, and that proposal Mr. Van Tuyl declined. So that we are of the opinion that Mr. Young did not accomplish a cancellation; indeed, did not attempt to exercise the right to cancel the contract within the time that by its terms he might have done so.

Holding these views, and believing that the measure of damages applied by the court below was not correct, and that the motion for a new trial should have been granted upon the ground that the award was too small, the judgment of the

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court of common pleas will be reversed, and the cause remanded.

*C. E. Longwell*, for plaintiff in error.

*B. F. Brough, Doyle & Lewis* and *C. A. Seiders*, for defendant in error

### CONVEYANCES.

[Circuit Court of Lucas County.]

WILLIAM H. A. READ, ASSIGNEE, ETC., v. TOLEDO LOAN CO.  
ET AL.\*

Decided, October 19, 1901.

*Conveyance—Instrument Witnessed and Acknowledged by Interested Parties—Acknowledgment Before a Notary a Ministerial Act—Grantor Estopped from Claiming Invalidity, When.*

1. A conveyance is not rendered invalid in Ohio by reason of the fact that the witnesses thereto and the notary who took the acknowledgment were interested parties to the extent of being stockholders in the grantee company.
2. An attestation by a notary public is not a judicial but a ministerial act in this state.
3. In view of the custom for the grantor to prepare his own deed, call the witnesses and acknowledge its execution before it passes into the possession of the grantee, he is estopped from objecting to a witness in whom he has thus reposed confidence in the witnessing of his own act.

HULL, J.; PARKER, J., and HAYNES, J., concur.

This case involves the question as to whether an interested party may witness a mortgage and also act as a notary public in taking the acknowledgment of the grantor.

The action below was brought originally in the probate court by the assignee, by filing a petition to sell real estate, making the Toledo Loan Company and others parties defendant. The Toledo Loan Company filed its answer and cross-petition setting up a mortgage given by Cary D. Lindsay, the assignor. The assignee replied, denying the validity of that mortgage,

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\*Affirmed by the Supreme Court (68 Ohio State, 280).

alleging that it had not been acknowledged or witnessed according to law. The mortgage was sustained in the probate court, and upon appeal a like judgment was entered in the common pleas court, and we have here a finding of facts by the court of common pleas. In paragraphs 4, 5 and 6 the finding of facts is this:

"4. That prior to and upon February 19, 1896, said assignor, Cary D. Lindsay, was a member of said The Toledo Loan Co. and on the said date subscribed for ten shares of the capital stock of said company; that thereupon, on the representation of said Cary D. Lindsay to said company, and upon agreement between said Cary D. Lindsay and said company that said loan should become and be secured by a first lien upon said lots, numbers 116 and 117, in Shaw's Monroe street addition to Toledo, Ohio, said The Toledo Loan Company, on February 19, 1896, loaned and advanced to said Cary D. Lindsay the sum of \$4,800 of and from the moneys theretofore raised by said company for said purpose of loaning to its members, said Cary D. Lindsay agreeing to repay said loan with interest in weekly installments, in accordance with the constitution and by-laws of said company; that in pursuance with said representation and agreement, and to secure the payment of said money so loaned, with interest, and simultaneously with the loaning thereof, said Cary D. Lindsay executed, acknowledged and delivered to said defendant, The Toledo Loan Company, his certain mortgage for said sum of \$4,800 upon said lots, Nos. 116 and 117, in Shaw's Monroe street addition aforesaid.

"5. That said mortgage was executed by said Cary D. Lindsay in the presence of Eva M. Ely and Grant Williams, and was acknowledged by said Cary D. Lindsay before Grant Williams, a notary public within and for Lucas county, Ohio; that at the time of the execution and acknowledgment of said mortgage said Cary D. Lindsay was a stockholder in said The Toledo Loan Company, and Eva M. Ely and Grant Williams were each owners of two shares of the stock of said company, and said Eva M. Ely and Grant Williams were not otherwise related to said The Toledo Loan Company or in any wise employed by it; and said Cary D. Lindsay then knew that said witnesses and notary, respectively, were stockholders in said company.

"6. That Eva M. Ely and Grant Williams each testified upon the hearing of this case that they acted as witnesses and notary, respectively, of said mortgage, at the request of said Cary D. Lindsay, and Cary D. Lindsay testified that he did not request



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either of them to act as witnesses, and that he did not request Grant Williams to act as a notary."

This last does not amount to a finding of fact as appears from its reading, but is a statement by the court of what the witnesses testified to. So that it appears that this mortgage given by Cary D. Lindsay to the loan company was witnessed by two persons, both of whom were stockholders to the amount of two shares in the loan company; that one of these stockholders who acted as a witness also took Lindsay's acknowledgment as a notary public.

It is claimed by the plaintiff in error that these persons were incompetent to act as witnesses, and that Williams was incompetent, by reason of his interest, to act as a notary public in taking the acknowledgment.

The case was very fully argued, and a very large number of authorities collected by counsel on both sides and cited to the court—authorities not only from this state, but from nearly every state in the Union, bearing upon this question. The briefs were very full, and have been very helpful to the court. However, in this opinion we shall not be able to review or cite any great number of these authorities.

The statute with reference to this question in this state is Section 4106, Revised Statutes, which provides as follows:

"A \* \* \* mortgage \* \* \* of any estate or interest in real property shall be signed by the \* \* \* mortgagor \* \* \* and such signing shall be acknowledged by the \* \* \* mortgagor \* \* \* in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation, and such signing shall also be acknowledged by the \* \* \* mortgagor \* \* \* before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto."

The question is whether, under the provisions of this statute, a person may act as a witness to a conveyance who is interested to the extent of being a stockholder in the grantee, and whether

such person may act as a notary public in taking the acknowledgment.

A number of cases from other states were cited by counsel for plaintiff in error, where it has been held that persons can not act either as witnesses or notaries public, upon the ground of their interest in the transaction, in the conveyance, or the property itself. In some of those states, and perhaps nearly all of them, it is held by the courts that the act of a notary public in taking an acknowledgment is a judicial act, and the courts hold that under the rule that a judge may not act in his own case or in a case in which he is in any wise interested, a notary public, as he acts judicially, can not act in any matter in which he has any interest. It is the settled law of this state, however, under the decisions of our Supreme Court, that the action of a notary public, in taking an acknowledgment, is not a judicial act, but a ministerial one, and manifestly, therefore, the reasoning of many of the decisions in other states is not applicable to the statute of this state.

It is to be observed from the reading of the statute itself that the witnesses are not required to be disinterested. The language of the statute is that it "shall be signed by the grantor, mortgagor, or lessor," and "in the presence of two witnesses, who shall attest the signing, and subscribe their names to the attestation," and then it further provides that such signing shall be acknowledged by the grantor, mortgagor, or lessor, before a notary public or some other officer named. The statute itself, then, does not provide that either the witnesses or the notary public shall be disinterested. There are statutes relating to notaries public which provide that they shall be disinterested in acting in certain matters, as in the taking of depositions, in which the statute provides that the notary public shall be some person who is not interested in the case.

So, then, the statute itself containing no express provision upon this subject, the question is, whether the policy of the law, or the law of this state, as established by the courts, requires the witnesses to a conveyance, or the notary public taking the acknowledgment to be disinterested persons. The pur

pose and object of witnesses to a mortgage or other conveyance, of course, is plain; that there may be on record in a matter as important as the conveyance of real estate the names of two persons, who certify that they saw the grantor sign the instrument, or heard him acknowledge the same. The purpose of the acknowledgment is to require a still further and more solemn attestation of his signature to the instrument, that he acknowledge it before an officer, who shall certify formally that he acknowledged the signature before him; all these provisions being for the purpose of the protection of titles, and of affording testimony and witnesses to the conveyance of real estate, which, in the times out of which this law grew, was regarded as a matter of great solemnity and importance.

In practice the grantor himself usually selects his own witnesses and the notary public before whom he desires to acknowledge his deed or mortgage. Until the mortgage has been signed, attested, and acknowledged, or the deed, if it be such a conveyance, it rests in the hands of the grantor. It is still in his possession and under his control. By whom it shall be witnessed and before whom it shall be acknowledged is a matter, ordinarily, for him to determine.

In this case it does not appear from the statement of facts that the grantor requested these persons to act as witnesses or notary public; it simply appears that he knew they were stockholders in the corporation. But in a case where the grantor had in fact requested a person or persons to act as witnesses or as a notary public, knowing that such persons were interested parties, were interested in the conveyance, the grantor himself selecting his witnesses from choice, it would seem that under such circumstances he ought to be estopped from complaining that the witnesses were interested, and therefore that his conveyance was invalid.

The question here is one of great importance, for if it be true that it invalidates a conveyance if a witness or the notary public is interested in the conveyance, to the extent of being a stockholder, it might affect, and doubtless would, the titles of a great many pieces of property, and in many cases it would

be impossible to determine from an examination of the records in the recorder's office whether a conveyance was valid or invalid, for it would not, in many cases, as in this case, appear upon the face of the instrument that either of the witnesses or the notary public was interested. In this case the grantee is The Toledo Loan Company. There is nothing in the record to show that either one of these witnesses has any interest in The Toledo Loan Company, or would be interested in a conveyance to the corporation. These persons sustain no relation to the company except that of stockholders. From that alone the plaintiff in error claims that the mortgage is void. His claim was well and succinctly stated in the brief of counsel, as follows:

"1. That inasmuch as Eva M. Ely and Grant Williams were both stockholders of the defendant company, the mortgage given to it by Cary D. Lindsay was never witnessed.

"2. That inasmuch as Grant Williams, the notary before whom said mortgage purports to have been acknowledged by Cary D. Lindsay, was a stockholder in said company, that said mortgage was never duly acknowledged.

"3. That never having been acknowledged and never having been witnessed as to its signature, said mortgage was not entitled to record in Lucas county, and its recordation is a nullity.

"4. That the plaintiff holds the legal title to said real estate free from all incumbrances or liens growing out of said mortgage."

This question has been discussed in some of the text books on the law of real estate, and some phases of it, at least, by our own Supreme Court, and whatever the law may be in other states, we must follow the decisions of our Supreme Court. An early case, in which the question of the qualification of a witness to a conveyance arose, is that of *Johnson v. Turner*, 7 Ohio (pt. 2), 216, where it is held that "A deed conveying lands is not to be impeached by showing that one of the subscribing witnesses is incompetent to testify." We find this in the statement of facts in the case:

"In this case an agreed statement of facts is submitted on which the questions to be decided arise. Walter Turner was indebted to the Bank of Zanesville in the amount stated in the

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trust deed under which the plaintiffs claimed, and on the application of C. B. Goddard, Esq., the attorney for the bank, executed the deed which was prepared and signed by said Goddard, as one of the subscribing witnesses, he being a stockholder in the corporation."

So that the facts in this case are similar to the facts in the case before us; the witness, who was the attorney, was also a stockholder in the bank. The Supreme Court held that it did not affect the validity of the deed. They say on page 218:

"But is not this deed in conformity with the statute? This is admitted, in all respects, excepting that General Goddard was *interested* in the corporation for whose benefit it was made, when he subscribed it as a witness, and it was executed by Turner. If interested, however small that interest may be, the general rule of law excludes the witness from giving testimony. It distrusts him and declares him disqualified. But if it be necessary to sustain this deed, to call this subscribing witness, would the rule which excludes an interested witness apply? The party whose right it is to object on the ground of interest may waive that objection, and the witness is then competent. He may call him himself, and he is competent; because if he testify for himself, who has the right to object? His evidence is against his own interest, and the more worthy of credence; and if called by the other side, whose claim it is his interest to support, and the objection of interest is waived, the law admits him to testify."

The objection to Goddard, the witness in this case, seems to have been on the ground that he was an interested party and would not be competent to testify if necessary to call him in a court as a witness. That objection under the law as it is now would not be good. But the Supreme Court say on the same page, in discussing the case:

"In England the grantee must prepare the conveyance and present it to the grantor for execution. We know of no such rule here. The grantor prepares his own deed. He calls his witnesses; they are selected by himself. He must then acknowledge its execution, and not until thus acknowledged does he part with its possession by a delivery to the grantee. Every act, therefore, is the act of the grantor while the deed remains in his possession, and the first act of the grantee is the accept-

ance when finally delivered to him. The grantor, then, should not, it appears to us, be permitted to object to a witness selected by himself, and in whose integrity he had reposed confidence, to bear witness to his own acts. But aside from this course of reasoning is this deed invalid? The statute, Volume 31, 346, Section 1, requires the deed to be executed '*in the presence of two witnesses, who shall attest such signing and sealing and and subscribe their names to such attestation.*' Unless the express provision of this statute, or its plain inference, lead to the conclusion that the witnesses to a deed must be *credible* and *competent* to prove its execution at the time of their attestation, and that such was the intention of the Legislature, reluctantly, indeed, would this court adopt such an opinion. If such be the law, it is time to look around us and ascertain by whom our deeds bear witness. Who ever instituted an inquiry when a witness was called to attest a deed, whether he was *competent* or *incompetent to testify in a court of justice*; or whether persons might not subsequently be found who would impeach him for the want of character for truth," etc.

They say at the bottom of page 219:

"The counsel for the plaintiffs have furnished us with the case of *Smith v. Chamberlin*, 2 N. H., 440. The opinion is given by the Chief Justice, Richardson, and appears to us fully to sustain us in our opinion of the law of this case, as to the validity of the trust deed. The opinion is founded on a statute of New Hampshire, of February 10, 1791 (1 N. H. Laws, 191), which contains this provision: 'That all deeds or other conveyances of any lands, tenements, or hereditaments, lying in this state, signed and sealed by the party granting the same, having good and lawful authority thereunto, and signed by *two or more witnesses*, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the registry of deeds in the county where such lands,' etc., 'lie, shall be valid to pass the same without any other act or ceremony in law whatever. On this section of the statute the chief justice says: 'In the clause now under consideration, there is nothing which indicates an intention in the Legislature to require that witnesses to a deed should be competent to prove its execution on redirect examination favorable to the plaintiff on this point at the time they subscribe it as witnesses. We have been much at a loss to conjecture why two witnesses were in this instance required by the statute. Surely they were not intended to be placed round a grantor for the same reasons they were placed

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round a testator. The most plausible conjecture is, that it was intended to render the proof of the instrument more certain. If this were the object, there is good reason to suppose that the word witness, was, in this instance, used in the simple sense of spectators of the transaction. A witness competent at the time might in one hour become incompetent; and a witness incompetent at the time might in one hour become competent. All that could be done with this view, by the Legislature, was to require that deeds should be executed in the *presence of two or more persons* who should put their names to the deeds as witnesses. It would have been idle to make the validity of the deed depend upon the incompetency of the witnesses, at a time when they could not be wanted to prove the execution of the deed.' "

It seems to us that this decision of the Supreme Court settles the question for us, that a witness to a conveyance may be an interested person, and that although he may be interested to the extent of being a stockholder, this does not invalidate the deed. In 2 Jones Law of Real Prop., Section 1126, the author arrives at the conclusion that that is the general law of the land. And his conclusions as to the notary are, that if there is nothing on the face of the deed to notify purchasers that the notary is an interested person, it will not affect the validity of the deed; and he says:

"An interest under a deed not apparent on its face does not disqualify an officer to take and certify an ordinary acknowledgment. Thus, if he is one of the beneficiaries in a deed of trust, he may take the grantor's acknowledgment, when his interest under the deed does not appear on the face of it. The fact that he acted as the agent of the mortgagor in obtaining the money does not disqualify him to take the mortgagor's acknowledgment.

"The chief use of an acknowledgment, as already noticed, is to perfect the deed for record. The grantor can select such authorized officer before whom to acknowledge his deed as he chooses. He may refuse to make his acknowledgment before an interested officer. Having voluntarily acknowledged the deed, the grantor is presumed to have voluntarily consented to its record. If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principle of equity would hold him estopped from setting up an undisclosed interest of the

officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as to the evidence of his title."

These remarks will apply to a witness as well as a notary, and perhaps with more force.

In *National Bank v. Conway*, 17 Fed. Cas., 1202, it was held by the United States Circuit Court that the fact that the notary was interested would not invalidate a deed. Chief-Justice Waite, deciding this case, among other things, said:

"It has been frequently denied that an acknowledgment before a grantee named in a deed was of no effect. \* \* \* It has also been held that a party interested in a deed can not take and certify the acknowledgment of a married woman requiring a privy examination. \* \* \* The taking of such an acknowledgment is, in some respect, a judicial act, and not ministerial only, but in the case of an ordinary acknowledgment it is purely a ministerial act. \* \* \* Upon this principle it was decided in *Dussuane v. Burnett*, 5 Ia., 95, that an acknowledgment before one not a grantee named in the deed, but interested in the conveyance, was good. The same distinction was recognized in *Stevens v. Hampton*, before cited."

And the chief-justice said further along in the opinion:

"The recording acts are intended for the security of titles and the prevention of frauds. They are to be construed liberally to that end. As the record, when made, is constructive notice to all having the legal right to rely upon it for protection, public policy requires that it shall import as near absolute verity as is consistent with a due regard to the rights of the parties interested. A deed acknowledged before one named as grantee, carries upon its face notice of that fact, or, what is equivalent, notice of circumstances sufficient to put a reasonable man upon inquiry. But when the name of the officer taking the acknowledgment does not appear as grantee, or as otherwise interested, no such notice or presumption accompanies the deed or its record. A certificate of acknowledgment is required to perfect a deed for record. The grantor can select such authorized officer for that purpose as he chooses. He has full power to protect himself against frauds by interested parties as certifying officers, for he may refuse to make his acknowledgment before them."

Under the law of this state, as laid down by the Supreme Court, it is not clear that it would be held that the taking of an



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acknowledgment of a married woman was a judicial act. We are of the opinion that it would not be. The comparatively recent case of *Amick v. Woodworth*, 58 Ohio St., 86, decides that a grantee in an instrument can not take the acknowledgment, and it is urged by counsel for plaintiff in error that this case modifies the decision (*Johnson v. Turner, supra*). The first paragraph of the syllabus is this:

"A grantee in an instrument for the conveyance or incumbrance of real property is disqualified, on grounds of public policy, to be an attesting witness to its execution, or to act in an official character in taking and certifying the acknowledgment of the grantor."

The court discusses the question fully in the opinion, and on the ground of public policy holds that a grantee in an instrument is disqualified from taking an acknowledgment. The court argues, page 100, and it is clearly true, that to permit the grantee in an instrument to "attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy and would practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on the grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent *bona fide* transactions." They say on page 101 of the opinion:

"It is probably unnecessary to notice that this question was not involved in *Johnson v. Turner*, 7 Ohio (pt. 2), and that case is unaffected."

So it seems to us that the Supreme Court intend here, and do expressly state, that the doctrine in *Johnson v. Turner, supra*, is not to be disturbed, and is not affected by this decision, which was rendered in 1898.

A case decided by the District Court of Mahoning County in 1881 is decidedly in point here. It is a very brief decision in *Horton v. Columbian Building & Loan Co.*, 8 C. C., 169, heard before Judges Sherman, Myer and Woodbury, and is as follows:

"The plaintiff in error executed and delivered a mortgage to the defendant in error to secure a loan made by the society to him, one of its stockholders.

"The mortgage was acknowledged before Owen O'Donnell, who at the time of taking the same was a stockholder in, and secretary and treasurer of the defendant in error, The Columbian Building & Loan Society, a corporation. In the suit in foreclosure brought by the society upon the mortgage, the defense was made that the mortgage was not properly executed for the reason that the notary public, O'Donnell, being a stockholder and officer of the society, the mortgagee occupied such a position as disqualified him from acting in his official capacity as notary.

"*Held*: That the official connection of O'Donnell with the society did not disqualify him from acting in his notarial capacity in taking the acknowledgment to the mortgage to the corporation of which he was an officer and stockholder."

In that case the facts were stronger than in the one at bar. The notary was not only a stockholder but an officer of the corporation. This decision, through brief, is to the point, and it is significant that it has stood in this state now for twenty years without criticism, so far as we know by the Supreme Court or any other court of the state. The court which decided the case was composed of able judges, and their decision is entitled to great respect, and we give it such respect.

In this state the act of the notary is not judicial, but ministerial, and it seems to us, both upon reason and authority, that it is not sufficient to invalidate a conveyance in Ohio that the witnesses or the notary are stockholders in a corporation to which the conveyance is made. To hold that this was sufficient would unsettle titles, and as the Supreme Court say in *Johnson v. Turner, supra*, we might well examine our conveyances, and look about us to see who were the witnesses that had attested them. We think there is every reason to hold against that claim for the purpose of security of titles. And the decisions of the courts of this state, as we understand them, are against the contention of the plaintiff in error.

For these reasons the judgment of the court of common pleas will be affirmed.

W. H. A. Read, for plaintiff in error.

King & Tracy, for defendant loan company.

**FIRE INSURANCE.**

[Circuit Court of Lorain County.]

**MANCHESTER FIRE INSURANCE CO. v. HENRY A. PLATO ET AL.\***

Decided, October 10, 1901.

*Insurance—Authority of Agent—Policy Written but Not Delivered or Premium Paid When Fire Occurred—Provision for Five Days' Notice Before Cancellation—Question of Cancellation.*

1. Where the agent of several insurance companies is solicited to place a policy for a given amount on a specified piece of property, and replies that he will do so, and thereafter writes a policy on the property in one of his companies, and the building is a few days later destroyed by fire, the company in which the policy was written is liable thereon, notwithstanding the policy had not been delivered nor the premium paid, there being no claim that the policy was not delivered because of failure to pay the premium.
2. The writing of the policy by the agent before submitting the risk to the home office bound the company, and a finding by the jury that five days' notice of the cancellation of the policy was not given as required by its terms will not be set aside, where the testimony as to notice was directly contradictory.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

In the case of the Manchester Fire Association against Henry A. Plato and John E. Plato, the defendants in error were the owners of a store building in North Amherst in this country. On October 13, 1900, one H. N. Steele, who was acting for the Platos, as their agent in the premises, had a conversation by telephone with Mr. R. W. Pomeroy about the insurance of their property. Pomeroy was the agent of a number of fire insurance companies, including the plaintiff in error. Steele asked him to insure the property. Steele and Pomeroy are at issue as to just what was said in this conversation.

Steele's testimony in regard to it is this:

"I asked Mr. Pomeroy over the phone if he would place \$500 insurance on the H. A. and J. E. Plato store building, lot No.

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\*Affirmed by the Supreme Court without report, April 27, 1903.

48, rate two per cent., and to begin that day, and he said he would."

Pomeroy's testimony on the subject is this:

"He called me up and wanted to know if I could place \$500 on Plato Brothers' store building, he called it. I told him I did not know whether I could or not, but I would try."

Then this question was asked: "Did you tell him that you would place or carry \$500 on that?"

Answer. "Not positively; no, I did not."

As the result of that conversation Mr. Pomeroy thereafter wrote out a policy for the Platos for \$500 in the German Insurance Company, of Freeport, Ill., of which he was the agent. In reference to this policy Pomeroy was asked this question upon the trial: "And what did you do with that policy?" Answer. "It was canceled; it was returned to the company." Question. "Was it ever sent to Platos or Steele?" Answer. "No, sir never went out of the office." After this was done, Pomeroy testified as follows: Question. "Well, after that was canceled and returned, what did you do then?" Answer. "I wrote a policy in the Manchester." This latter policy was dated on October 16, 1900, and is made a part of the bill of exceptions.

There is no question as to the authority of Pomeroy to write and issue this policy and thereby bind the company by its terms.

The building named in the policy was totally destroyed by fire on December 26, 1900, and the owners made proper proofs of loss, so if the policy was in force at the time of the fire they were entitled to recover from the company the amount of the indemnity named therein, to-wit, \$500.

The company denied liability and suit was brought against it by the Platos on the policy, and judgment obtained against the company, to reverse which this proceeding in error is prosecuted.

On the part of the company it is urged that the company was never bound by the policy. The policy remained in the office of Pomeroy until it was sent by him to the insurance company as hereinafter mentioned. Neither the Platos or Steele paid the premium on the policy, nor was such premium tendered to the company or its agent until after the destruction of the insured

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property, when Steele made tender of the proper amount, acceptance of which was refused by Pomeroy.

It appears there had been a course of dealing extending over a period of several years between Steele and Pomeroy, by which Steele, who was himself the agent of one or more insurance companies at North Amherst, would have Pomeroy issue policies to his customers when he could not in his own company carry the insurance, and then later a settlement would be had between Steele and Pomeroy, at which Steele would pay Pomeroy on such policies as he had written for Steele's customers. This being true, the fact of non-payment of premiums alone ought not to prevent the insured from recovery especially when no claim is made that Pomeroy retained the policy on account of such non-payment.

If Pomeroy had the conversation with Steele as he says he did, and in pursuance of what was then said wrote this policy and reported it to his company he bound the company by its terms. See *Machine Co. v. Insurance Co.*, 50 Ohio St., 549; see also *New York Life Ins. Co. v. Babcock*, 30 S. E. Rep., 273 (104 Ga., 67). This last was a life insurance case. The application was made to the agent, and by him forwarded to the company; the premium was paid at the time the application was left with the agent, the company accepted the risk and issued the policy and sent it to its agent. It remained in his hands until after the death of the assured. The court held that the company had bound itself.

It is true the premium there was paid. But what has already been said disposes of what we think as to the premium in this case. In that case the application had been sent to the company, because in life insurance the policies are not binding until the company has approved of the application; indeed the policies are not issued except as the company approves the application.

In this case the policy itself shows that Pomeroy was authorized to issue the policy, and it became valid upon the signature of the agent, providing, of course, the other things necessary to make it a contract took place. The fact that the policy had not been delivered to the assured in the case to which attention is called in *New York Life Ins. Co. v. Babcock*, *supra*, cuts no figure in the decision. The court held the policy remaining in

the hands of the agent did not affect the question of whether the contract of insurance was binding upon the company. To the same effect is the text of 16 Am. & Eng. Enc. Law (2d Ed.), 855, and the authorities there cited.

It is urged on the part of the insurance company that Pomeroy did not promise Steele he would insure this property in one of his companies; but only that he would try to insure it. Pomeroy, who had full authority to bind the company by issuing the policy, immediately wrote a policy in the German company which he canceled, as he says, by order of the company. The very fact of cancellation is evidence that in that company at least there was a contract by which until canceled it was bound.

In *Insurance Co. v. Maguire*, 51 Ills., 347, this language is used: "The very fact of an attempt at cancellation is an admission there was a policy capable of being canceled."

Upon the cancellation of this policy in the Freeport company, without any further conversation or communication with the assured or their agent, Pomeroy wrote the insurance involved in the present action. The policy provides for a cancellation by the company upon a five days' notice. If this was not to take effect until Pomeroy should hear from the home office, why did he write it; why not submit the question of whether the company would carry the risk to the home office before writing the policy? This question in substance was asked in various forms of Mr. Pomeroy, and no satisfactory answer was given. It seems clear the policy was written upon the understanding that the company should be bound by it until it should be canceled, which could be done upon five days' notice to the assured.

When this policy was reported by Pomeroy to the home office, the company notified him the company would not carry the risk at the rate stipulated, and he thereafter sent the policy to the home office; just how soon does not appear. And Mr. Pomeroy says he notified Steele that the company would not carry the risk, and he gives the conversation in which he says he gave this notice. Steele denies this. They are distinctly at issue about it.

If, as has been already stated, the company became bound by the terms of the policy, then it remained in force until canceled

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and notice of such cancellation must have been given to the assured, and the notice must have been at least five days before the policy ceased to be valid.

The burden was upon the company to show that there had been such cancellation, if the policy was ever binding.

The jury must have found that no such notice was served upon the assured, and under the law as given by the court, none upon Steele. As to whether notice to Steele would have been sufficient it is unnecessary to discuss.

Attention is called to the case of *White v. Ins. Co.*, 95 Fed. Rep., 161, upon the question as to whether notice to an insurance broker who effected the insurance is sufficient notice to bind the assured. But whether that be so or not, we are not satisfied that the jury were wrong in finding that no notice was served upon either the assured or upon Steele of the cancellation of the policy; that being so that no notice was served, the policy remained in force and it entitled the assured to recover as it did recover in this case. We are not prepared to say the jury found wrong on that fact, and hence the judgment is affirmed.

*E. G. Johnson* and *F. M. Stevens*, for plaintiff in error.

*H. G. Redington* and *Webber & Metcalf*, for defendant in error.

**PRISONER INJURED IN WORK HOUSE.**

[Circuit Court of Muskingum County.]

ROBERT GREEN V. COMMISSIONERS OF MUSKINGUM CO. ET AL.

Decided, October Term, 1901.

*Negligence—Resulting in Injury to a Work House Prisoner—No Liability Attaches to Municipality—Governmental Powers of Municipality.*

No liability can attach to a municipal corporation on account of an injury to a work house prisoner, resulting while operating by compulsion a machine alleged to have been defective.

NORRIS, J., DAY, J., and MOONEY, J., of the third circuit, sitting in place of DOUGLASS, J., VOORHEES, J., and DONAHUE, J., of the fifth circuit; opinion by DAY, J.

The plaintiff disclaims any right of action against the county commissioners, who were made parties under the impression that they were liable, and the case, so far as that board is concerned, is dismissed.

The petition avers that plaintiff is a minor and brings this action by his next friend, who says, in substance, that the city of Zanesville and Muskingum county, jointly, own and conduct a workhouse at Zanesville, where persons convicted of offenses against the ordinances of the city, or the statutes of the state of Ohio, are confined at hard labor, on sentence of a competent court; that on January 20, 1900, the minor plaintiff was confined in this workhouse on an order of commitment from the mayor's court of said city, and he was required by the officers and employes of said workhouse, in charge thereof, to labor in a broom factory operated therein, and was required to work at a machine which he was not physically able to operate in safety; that the machine was defectively constructed, all of which the city authorities knew; that on said January 20 the plaintiff, while so employed, under compulsion of the defendant city, through its officers and agents in charge of said machine and works, because of his physical weakness and the negligence and failure of the defendants to furnish proper machinery, and because



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of their negligence in furnishing said defective machinery and permitting it to remain out of repair, without fault on his part, the plaintiff got caught in said machine and was seriously injured in his person, to his damage in the sum of \$5,000, for which he prays judgment against the city.

The lower court sustained a demurrer to the petition, and plaintiff, not desiring to amend his petition or further plead, the petition was dismissed at the cost of plaintiff. Plaintiff prosecutes error and seeks a reversal of the judgment and judgment overruling the demurrer to the petition.

But a single question is presented: Does the petition state a cause of action in the plaintiff's favor and against the city of Zanesville?

The petition, possibly, states a case against the persons whose active and affirmative acts and conduct were so negligent as to directly and proximately occasion plaintiff a serious injury without any fault of his own, but it is not believed that it states a cause of action entitling him to relief against the municipal corporation, the city of Zanesville, while the city, as we think clearly appears, was in the discharge of a wholly governmental duty as the duly constituted agency of the great public, the state of Ohio, and concerning which the city has no liability. It can not be doubted that the power conferred on municipalities, to preserve the peace and protect persons and property by the arrest of offenders and their commitment and detention in jails and workhouses, is of a public or governmental nature, in which the sovereign state exercises its functions through the agency of the municipality. In such case the non-liability of the municipality rests upon the same reason as does that of the sovereign exercising like powers.

In *Western College v. Cleveland*, 12 Ohio St., 375, 377, Judge Gholson says that—

“There is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its

adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state—discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable.”

This language of Judge Gholson is quoted with approval in *Frederick v. Columbus*, 58 Ohio St., 538, 546, 547, and in this last named case, the court, through Judge Minshall, p. 548, quotes from a similar decision of *Hayes v. Oshkosh*, 33 Wis., 314, and says:

“The decision is fully supported by the authorities and the decisions in the other states of the Union. There is, in fact, a remarkable unanimity on the subject.”

We think the lower court did well to sustain the demurrer and dismiss the petition, and we affirm its judgment with costs but without penalty. There will be a judgment for costs, execution is awarded, and cause remanded for execution.

*McHenry & O'Neal*, for plaintiff in error.

*C. C. Lemert*, for defendants in error.

**PREFERENCES UNDER THE OLD LAW.**

[Circuit Court of Huron County.]

**FIRST NATIONAL BANK V. H. G. LEISE ET AL.**

Decided, 1901.

*Chattel Mortgages—Executed Prior to the Cohen Law, and on the Eve of Assignment—Mortgagees Could Legally Take Possession of the Property—Notes Discounted in Bank—Not Extinguished by New One Day Notes Secured by Mortgage, When.*

1. Chattel mortgages given to secure *bona fide* debts were not invalid under Section 6343 prior to its amendment (93 O. L., 290), and did not constitute the agent of the mortgagees, who took possession of the property, a trustee for the benefit of all the creditors.
2. The making of new one day notes, secured by mortgage on the maker's stock of goods, to take the place of former unpaid notes to the same payees, which had been discounted in bank and which the payees promised to return to the debtor, did not extinguish the indebtedness, and gave under the mortgage no advantage to other creditors than the payees.

HAYNES, J.; MOONEY, J., and HULL, J., concur.

This action was brought here by appeal from the court of common pleas. Action was brought in that court for the purpose of setting aside certain transfers of property and to declare a trust for the benefit of all creditors under Section 6343, Revised Statutes, and extending under Section 6344. The proper issues were made up from the pleadings and the case has been heard upon the evidence, and upon the argument of counsel.

Briefly, it appears that J. L. Hudson, prior to 1894, or about that time, had been carrying on the business in this city of selling ready-made clothing, and about that time he desired to withdraw from the business here. Mr. Leise had been in his employ for some time, here and at Detroit, and knew him well and he desired to purchase the goods and remain here and carry on the business; and such negotiations were had that Hudson sold out to him for something like \$2,200 and took notes for that amount

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\*Dismissed in the Supreme Court for failure to file printed record.

payable at a future time, but with a separate arrangement in writing between the parties that Leise might pay \$75 per month until the amounts were paid.

Leise desired to enlarge the business, or rather to extend it and to carry on the business of selling dry goods, and for that purpose it was necessary for him to purchase from merchants dry goods, and he sought to purchase from certain firms in Detroit, the firm of Strong, Lee & Company and Edson, Moore & Company, and I believe he purchased from some other firms at other points. To enable him to do so, Mr. Hudson entered into a guaranty with these respective parties, guaranteeing the amount of the goods that each might sell him, up to a certain amount. They made sales to him payable at a future time, and the business was carried forward by Mr. Leise for a period of perhaps eighteen months. The business did not prove remunerative. His sales were light and his expenses were a little large and he found himself in a failing condition.

It appears from the testimony that he had told Mr. Hudson at the time he gave this guaranty for the payment of these goods and perhaps before that time, that he would protect him in case of any financial trouble. In carrying on the business he has created some other indebtedness, he had borrowed money of friends of those that were rather intimate with him and had created some indebtedness for goods and had borrowed money from the First National Bank of Norwalk for the purpose of carrying on his business the sum of \$1,500 or \$2,000, which was still due and owing.

Finding himself in this position, he notified Mr. J. L. Hudson, or rather the agent of Mr. Hudson in Ohio, who lived at Sandusky, Mr. Hicks—Mr. Hudson himself living at Detroit—that he would have to stop business. Thereupon Mr. Hudson came to Ohio and appointed a meeting with Mr. Lieise and Mr. Hicks, his manager, at Cleveland, at the office of a firm of lawyers, and there it was arranged and agreed and carried out, so far as it could be, that mortgages should be executed to Mr. Hudson and to some of these other creditors for the purpose of securing them to the amount that he was owing to each. It seems that at the same time there was a deed of assignment drawn up

whereby an assignment was to be made after the filing of the mortgages to a trustee for the benefit of creditors. This was done on Sunday afternoon, on February 9, but all papers were dated February 10. Mortgages were given to each of the creditors—a mortgage to Hudson, to Strong, Lee & Company, to Edson, Moore & Company and some others.

The mortgages contained a condition that the mortgagees should take immediate possession of the stock of goods. There were also executed, at the same time, notes payable one day after date, direct to the mortgagees.

The next morning Mr. Leise returned home, and Mr. Hicks and Mr. Loeser came here, Mr. Loeser being an attorney from Cleveland.

It had been agreed that Mr. Hicks was to be the man who was to take possession of the stock of goods for the mortgagees, and Mr. Hudson returned to Detroit for the purpose of seeing the parties in regard to that matter. He did see them in the morning and it was agreed by them, or consented to by them, that Mr. Hicks might act as their respective agent in taking possession of the stock of goods under the mortgages; and that was done, as the testimony shows, before a final consummation of the arrangement by the filing of the mortgages. He took possession of the stock of goods and the mortgages were then filed in the recorder's office in this county.

Shortly after, Mr. Hicks, as the agent of the mortgagees, took possession of the stock of goods and closed the door, or about the same time the deed of assignment was signed and executed and Mr. S. M. Young of this city was named as assignee, and that paper was filed in the office of the probate court and Mr. Young went to the store and demanded possession of the stock of goods under it, but he was told that he could not have it and was allowed to remain outside of the building, and within three or four days this suit was commenced. Hicks, in the meantime, after closing the store, was proceeding to take an invoice of the stock of goods. That stock of goods, either by agreement or under an order of the court, has been sold, and the money is in the hands of a trustee awaiting the action of the courts in regard to these mortgages.

It transpired from the evidence which was brought out upon examination, that J. L. Hudson had received notes originally; and, in the course of business, had transferred them to a bank, for his own convenience, raising the money on them to be used in his business, and that Strong, Lee & Company and Edson, Moore & Company had done the same thing.

I believe that comprehends substantially all the facts that are material to the case.

It is intimated here that this transaction operated as a fraud upon the other creditors. That the effect of it was to entirely deprive them of any part in the proceeds of the stock of goods, is true, and we suppose their debt still remains wholly unpaid and will be unpaid unless Mr. Leise at some time should be able to make money enough to pay them.

That there was actual fraud, in that there was an agreement at the time of the original transfer of the stock of goods to sell same and pay the indebtedness to Hudson, restock by purchase on credit and thus take the proceeds for the benefit of J. L. Hudson, is not claimed, nor is it shown by the evidence. We think the evidence shows that Mr. Hudson was willing to allow this clerk of his to try his hand at carrying on the business, but that he had some doubts whether he would be successful, and as the matter proceeded, perhaps had still more doubt; but he was willing to give him time and did give him time, and he allowed his installments of payments to pass at times unpaid. He assisted him to buy goods and incurred indebtedness on his paper for the purpose of enabling him to carry on his business, a fact which we conceive to be wholly inconsistent with actual intent of fraud on the part of Mr. Hudson. So that at the time that Mr. Leise had given notice that he would carry on the business no longer, the matter simply stood in such a manner that the transaction to be carried out, or whatever was to be done, was to take such legal steps as would prefer or protect Mr. Hudson and those other parties in accordance with the statement of Leise previously made that he would do so. That we conceive makes no special difference.

The question is, whether or not this matter of taking these preferences is illegal in the state of Ohio; whether the manner

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in which it was taken is illegal, or would render it obnoxious to any provision of the statutes in this state.

That possession taken under these mortgages could not make Mr. Hicks a trustee is clearly settled by a decision of the Supreme Court of this state, a decision that has been in force for forty-two years and has been approved and never disputed by the Supreme Court of this state, and that is the case of *Justice v. Uhl*, 10 Ohio St., 170, where claims being in the hands of Conners, Giddings & Bigelow, a firm of lawyers then doing business in Sandusky, they had taken mortgages to the separate creditors and had taken possession of the stock of goods as agents for those creditors; the Supreme Court said that that was perfectly lawful and right and did not make it obnoxious to any statute of the state of Ohio, and the present statute I understand was in force at the time, or one similar to it. So the taking possession of this stock of goods by Mr. Hicks as agent of these separate mortgagees, did not constitute him a trustee for the benefit of all the creditors.

The question was somewhat discussed and the question is in the case, whether or not the making of these mortgages and the assignment to a trustee at substantially the same time, would or could or should operate as an assignment in trust for the benefit of all the creditors.

In *Sylvester v. Hesslein*, 5 C. C., 256, this court, sitting in Lucas county, composed at that time of Judges Bentley, Scribner and myself, had that question before us. The question had been decided by some other circuit courts, and there had been perhaps three of them that had passed upon the question, and others, I think, were getting ready to.

In that case Hesslein, who was carrying on business at Toledo, a dry goods business, was pressed by a Chicago creditor for payment, or for security, and she executed to him a chattel mortgage on her stock of goods and allowed the creditor to take possession; she then, without being pressed or solicited in any manner, gave mortgages to sundry of her other creditors and caused them to be delivered or filed by their agents, subject to this prior mortgage and the taking possession under that mortgage; then she made an assignment of all her stock of goods to Mr. Black,

of the city of Toledo, subject to his mortgage, and he wrote an acceptance, but it was never filed in probate court, and he never acted upon it in any manner. The party who held the first mortgage proceeded to sell the stock of goods and they were going to divide the proceeds between themselves, but the creditors intervened and filed their petition, and the matter then came up for hearing. We held that, in that case, as far as the Chicago creditor was concerned, that he, being an adversary party and pressing for a mortgage, had the right to hold his mortgage, and that as to all the other mortgagees, it being a voluntary matter on the part of Hesslein, and an assignment having been made substantially at the same time, that same was an assignment in trust for the benefit of all the creditors; and we directed that the matter be sent to the probate court for the appointment of a trustee for carrying out all the purposes and objects of the trust.

The case was never taken up; the matter was settled immediately by the parties and the case ended. We decided that case in 1891. We thought that good law and we have never gotten away from that position. But the Supreme Court, however, the next year, took a different view of the matter and in *Cross v. Carstens*, 49 Ohio St., 548, 566, discussed the matter very fully. The case came up from Cincinnati, and perhaps these various decisions coming from the circuit courts of the state, the question having been before the courts throughout the state, they deemed it advisable to pass upon the question. The question was in the case, possibly, although they might have decided the case upon another point alone, but as the question was in the case, they saw fit to decide it, and it is in fact a decision of the Supreme Court of Ohio upon a point that was made in the case which was before them and which they might properly decide; and they say, speaking of the decision such as we had made:

“This doctrine has been confidently argued by eminent lawyers and has recently received the sanction of at least one Ohio court of high standing, perhaps of more than one. There is about it a spice of the heroic which challenges admiration, though it may not win acquiescence. Indeed, we may confess that when first presented we were attracted to the doctrine. But reflection has satisfied us that it is consistent neither with a fair interpre-



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tation of the statutes, nor with the previous decisions of this court, and, as an attempted rule of property, would prove unsubstantial and delusive, and practically impossible of execution."

Thereupon they proceed to establish and hold a contrary doctrine for the state of Ohio. They say for fifty years or more, in the state of Ohio, almost from the earliest establishment of the courts, the doctrine that a man might dispose of his own property as he saw fit, for the purpose of preferring creditors, was right; that it was held by him, and was a right which was proper for him to exercise and a right in which he had been sustained from time to time by the courts, and in which, in this decision, they sustained him.

So that, under the decision of the Supreme Court, there could be no question but that this party had the right to make these mortgages. The mortgagees had a right to take possession under those mortgages and they had a right to hold their property, although the effect of it was to deprive other creditors equally meritorious, of any right or share in the distribution of the property, and to leave them entirely without security for their indebtedness, and that the deed of assignment did not deprive them of that right.

Now, there was another complication that came into the question that is raised here, and that is this: As I have said, it appears that these various creditors had, in the course of their business, negotiated notes at the bank and had taken the proceeds and had applied them to the uses and purposes of their business in their regular course of business.

In other words, in carrying on their business, they used all their notes that came in that way and discounted them and carried along the debt for the time, and if the notes were not paid by the debtor, then they took them up themselves.

Reference is made to the case of *Pendery v. Allen*, 50 Ohio St., 121. In that case Emerson had become surety for some parties by the name of Rowe. Allen owed to the bank in Cincinnati the sum of ten thousand dollars. The Rowe notes were eight thousand dollars. Emerson took a mortgage from Allen to secure himself upon his endorsement, and at the same time agree-

ing to pay to Rowe the amount of their notes, and also at the same time agreed to pay the bank the note that was owing by Allen to the bank upon which Emerson, prior to that time, had not been liable.

The Supreme Court held that in doing that he had rendered himself, or brought himself under this statute; that the transaction should be declared an assignment in trust of the property for the benefit of all the creditors. In other words, that in receiving the mortgage and in taking the steps that he had, that he had received property from a failing debtor in contemplation of insolvency in trust for himself and for others, and that in doing so, the statute would step in and declare the trust a trust for the benefit of all creditors.

They recognized the right of Emerson to secure himself as an endorser upon that paper. The court say, page 132:

“He might safely have secured his liability for Allen to the Rowes; but, having gone beyond this, and accepted a mortgage intended to secure another creditor, he became by force of the statute a trustee for all, and in respect to all the property covered by the mortgage. \* \* \* And his liability in this regard is to be determined not by subsequent events, but by the nature of the transfer at the time it was made. If, by its terms, or necessary implication, it made him liable to account to another creditor of the debtor, it is an assignment in trust within the meaning of the statute.”

They argued as far as the bank was concerned, that having received this property upon the agreement that he would pay that debt, the bank would have the benefit or the right to come in and compel him to account to it for the property that he had received.

Now that transaction and this are different, and when we come to reflect upon it, they are quite different. These parties were creditors of Leise; they had sold him goods and had claims against him for the price of those goods. It is true that he had given them notes to the amount of the price of those goods although the notes didn't pay the account. The account still existed and existed for all time and does exist to-day, because it is not yet paid.

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In *Merrick v. Boury*, 4 Ohio St., 60, the Supreme Court say:

"It is only by force of an agreement of the parties that the giving of an unsealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly; and the question whether there was such an agreement is one of fact to be determined by the jury."

There is no proof and no way whereby it can be known that there was ever any agreement that these notes were to be taken by the parties as payment of that account; that account existed all the time and still exists. The notes that were taken by the parties were by them, in the course of their business, transferred to the bank simply to raise money to be used in their business. They never applied that money to the payment of the account. They could not do so. It was not what they were negotiating the notes for. They were negotiating the notes simply to carry on their business, and to pay their debts, and to purchase goods in their business.

When they came to take these mortgages, they took the mortgages to secure that debt. It is true, when they came to do it, they chose to put it in the form of a note payable at one day, with the understanding that the other notes should some time be returned to the debtor; but the thing that they were doing, the real transaction was, that they were securing the debts of these respective creditors which have never been paid in any manner or form. They never took those mortgages, in any way or form, with the understanding that anybody else was to be benefited by them, and the payment of those notes to the banks, held by them respectively, did not pay the debts due from Leise that still existed.

With this statement of facts and this discussion of the law of the case, as we think, in all its material aspects, we are wholly unable to see wherein the plaintiff has any right to set aside the transfers that were made by Leise to these parties, by virtue of those mortgages or to declare them void in any manner or form by the law of the land, as it existed at the time of the transaction. Each of these respective creditors have, we think, without doubt, the right to hold this property and to apply it

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upon the payment of their respective mortgages according to their respective rights and equities. In saying this, we do not wish to say that we approve of the statute as it has stood for fifty years in this state. We have held, and we believe that the rule is, that equality is equity, and we rejoice that the Legislature of the state has finally passed a law which prevents any transfers of the character of these now before us. But inasmuch as this transaction occurred prior to that law, and where the law in force was as I have already stated it, we are compelled to announce and to adjudge that the mortgagees have the right to hold that property, and we so order.

*C. L. Kennan and S. M. Young, for plaintiff.*

*C. P. & L. W. Wickham, for defendants.*

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### WILLS.

[Circuit Court of Lucas County.]

BERTHA KETTEMANN, EXECUTRIX, ETC., ET AL V. KATIE METZGER.

Decided, November 1, 1901.

*Will—Questions in Suit to Set Aside—Undue Influence and Mental Unsoundness—Evidence Based Upon Facts in Decedent's Life at Time of Making of the Will—Competent, Though It May Be of Little Weight—Charge of the Court—Where the Will is Unjust, Jury may Consider Reasons Therefor—Reviewing Court may Weigh the Evidence—And Set Aside a Jury's Finding Where Manifestly Wrong—A Fair and Natural Disposition of Property.*

1. In a suit to contest a will involving a claim of undue influence, any testimony that will shed light on the question of whether the will as made was the will of the testator is competent.
2. And so as to mental unsoundness. Non-expert witnesses who were acquainted with the testator may be called, and their testimony received for what it may be worth.
3. The affidavit of a witness to the execution of a will, made in connection with the admission of the will to probate, is not competent in a suit to break the will, where it does not appear that the witness is prevented by death or otherwise from being present to testify.

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4. For the court to charge the jury that "It is the right of every man, which right can not be taken from him, to do what he desires with his own, unless the disposition he makes violates some law," is misleading for the reason that it leaves undue influence or mental capacity entirely out of the question.
5. Where an unjust will has been made, it is the province of the jury to consider whether the testator would have made such a will, had he been of sound mind or free from undue influence.
6. A reviewing court has power to review the testimony in a will case, and if the verdict is clearly and manifestly against the weight of the evidence, it has the power to set aside the verdict and order a new trial as in other cases.
7. Where the weight of the testimony clearly indicates that the testator had sufficient mental capacity to make a will, and in view of all the circumstances the will which he did make was a fair and natural one, a finding by a jury that such will was not the decedent's last will and testament should be set aside.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

This action is brought to set aside the will of John Kettemann. It was heard in the court of common pleas before the court and daughter of John Kettemann deceased, was the plaintiff below; setting aside the will. Katie Metzger, defendant in error, the daughter of John Kettemann, deceased, was the plaintiff below; plaintiffs in error were the defendants. It is to set aside the judgment entered upon the verdict that these proceedings in error are brought in this court.

Plaintiffs in error claim that the court below erred in admitting evidence and in ruling out certain testimony; erred in its charge to the jury and in its refusal to give certain requests asked; and further, that the verdict of the jury was against the weight of the evidence and not sustained by sufficient evidence, and that the court erred in overruling the motion for a new trial on that ground.

A large number of witnesses were called upon the trial—together about thirty—the plaintiff below calling twelve and the defendants nineteen. The petition asked to have the will set aside on the ground that John Kettemann was mentally incapacitated to make a will at the time it was made, and upon the further ground that the will was brought about by the undue

influence of Bertha Kettemann, his wife, and certain other persons not named in the petition. John Kettemann at the time of his death, which occurred in August, 1900, was sixty-seven years old. The will was made on March 4, 1880, when he was forty-seven years of age, and gave all of his property to Bertha Kettemann, who was then his wife by a second marriage, which occurred October 23, 1879, a few months before the making of the will. Katie Metzger, the plaintiff below, was John Kettemann's only daughter by his first marriage, and only surviving child at the time the will was made. John Kettemann and George Kettemann, two of the plaintiffs in error, are the sons of Bertha Kettemann by her marriage with John Kettemann. John Kettemann left an estate, according to the testimony, amounting to between \$15,000 and \$16,000 in real estate and personal property, the real estate being valued at between \$13,000 and \$14,000, he having \$2,000 in a bank at the time of his death. Katie Metzger's mother, the wife by the first marriage, had some property, and as that cuts some figure in the case, I will mention it. She died leaving an estate of perhaps \$5,000 or \$6,000, most of which in the end, as will appear in the discussion of the case, went to Katie Metzger, the only daughter.

After John Kettemann's death the will in question was found in his safe. The evidence does not disclose who wrote the will. They were unable, apparently, to find out in whose handwriting it was. He referred to it in the last days of his life, or rather referred to his papers, stating to those around him that his papers would be found in his safe; and among them was found this will. The record does not disclose that his widow or either of his two sons had any knowledge of the existence of this will until after his death.

The will is very short, and was drawn substantially after the form given in Swan's Treatise, where a testator gives all of his property to his wife. On the face of it, it was duly executed and witnessed by two witnesses. It covers altogether about a page of "legal cap." It was duly admitted to probate by the probate court of this county, and not long thereafter the peti-

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tion was filed by Katie Metzger, his daughter, to set aside the will.

The testimony in the trial of the case took a wide range, as is usual in will cases, covering the last twenty-five or thirty years of John Kettemann's life; and his relations with his daughter and his first wife, his second wife, his relations with his neighbors; his conduct; his peculiarities and his characteristics; his habits; his expressions of affection or want of affection for his daughter and first wife, and many other matters were gone into in the testimony, to bring before the jury as nearly as possible a sort of word photograph of the testator in all of his relations in life, particularly his relations with those who might be the proper objects of his bounty; and testimony as to his mental capacity, his peculiarities, eccentricities, his habits of drinking, so far as that affected his mental capacity, was given by witnesses called on both sides.

After hearing all the testimony and the charge of the court, the jury returned a verdict that the paper in question was not John Kettemann's will. A motion for a new trial was overruled, and by the judgment of the court the will was set aside.

Plaintiff in error claims that at the trial of the case the court erred in admitting certain evidence offered by the plaintiff. The first of this evidence to which I will refer was testimony relating to the habits of his first wife for frugality and industry and his relations with her, showing that he and she lived happily together, that he had affection for her; testimony as to the habits of Katie Metzger, the plaintiff below, of frugality; the work that she did after her mother died, which was in 1873, and before her father's marriage with the plaintiff, which was in 1879. There was considerable testimony of that kind introduced over the objection of the defendants below, and to which they excepted, and the admission of it is claimed as one of the errors in the trial.

Before discussing that I may as well speak of another class of evidence that was allowed to be introduced, and that was testimony as to what John Kettemann said about his wealth before he made this will—the amount of property that he was worth; some of the witnesses testifying that he said he was worth \$60,-

000 to \$70,000, and some of them said \$75,000; testimony as to conversations between him and Katie, and his demeanor toward her and his conduct toward her. He finally came to dislike her for some reason, and indicated it by harsh language toward her about the time she left her father's house. This was objected to, and exception taken. In a general way this was the character of this class of evidence to which objection was made.

It is urged that the fact that John Kettemann's first wife was frugal or industrious, or the fact that Katie worked in her father's house for some years after her mother's death, did not prevent his making a will which disinherited Katie, the daughter of his first wife. As a proposition of law, that is, of course, correct, but where the question is whether a will has been produced by undue influence, in connection with the question whether the testator had sufficient mental capacity to make a will, any testimony that might or would shed any light upon the question as to whether the will as made was probably his will or not, or whether brought about by any undue influence, is competent. The weight of the testimony is properly left to the jury, considering all the testimony in the end that has been offered, and determining the question whether the paper writing is in fact the will of the testator or not. If the testimony was entitled to any weight in the consideration of this question, it was properly admitted. In our judgment this testimony was properly admitted by the court. The plaintiff was entitled to show all these things in connection with all the other testimony that she had, bearing upon the question of John Kettemann's capacity, and of undue influence, and have it all go to the jury, and there was no error in admitting this testimony.

Several non-expert witnesses were called by the plaintiff below, and over objection were permitted to testify that in their judgment John Kettemann was of unsound mind. This testimony was objected to, and its admission is claimed to be error, on the ground that non-expert witnesses should not be permitted to give their opinion as to a man's mental capacity, unless based upon facts showing that they are competent to give an opinion that would be entitled to some weight.



The rule is laid down in Ohio in *Clark v. State*, 12 Ohio, 483, where the Supreme Court say in the syllabus: "On the question of insanity, witnesses, other than professional men, may state their opinion, in connection with the facts on which it is founded." This is perhaps the leading case in Ohio on the question, which is fully discussed in the opinion. The case has always been followed.

The testimony of these witnesses discloses that they did in each case state some facts on which they based their opinion. In some cases there were more facts than others. In the case of some witnesses the facts which they stated were quite meager, but yet in each case the witness showed some acquaintance, and in most of the cases quite a long acquaintance with John Kettemann, and testified to some peculiarity or eccentricity on which they based their opinion that he was of unsound mind, and we think that there was no error in admitting the testimony of these witnesses. Where their testimony disclosed that they had but little opportunity to observe him, and were not able to state facts that shed very much light upon his mental condition, the opinion would not be entitled to a great deal of weight with the jury. But it was a question of weight rather than competency, each witness testifying to some facts and to an acquaintance with Kettemann which, in our judgment, under the rule, entitled the plaintiff to have his opinion as a non-expert witness. I will say in passing that there were no "experts" called in this case on either side to testify on the question of mental capacity.

It is claimed that the court erred in ruling out the affidavit of one of the witnesses to the will; that is, the affidavit, or rather what is called the testimony of the witness to the will which was filed in writing in the probate court in the form of an affidavit, the statute providing for the admission of the will and its probate on the part of the defendants in opening the trial of a will contest. In this case, not only the order of probate was read, but the written testimony of one of the witnesses, Valentine Braun, as it appeared in his affidavit filed in the probate court, which was short, and in the usual form, in which he makes oath that he subscribed his name as a witness "at the request of the testator, and in his presence, and in the presence of Franz Holze-

mer, and that he saw said testator sign said instrument at the end thereof and heard him acknowledge the same to be his will, and that said John Kettemann, at the time of executing the same, was of full age, and of sound mind and memory, and not under any restraint."

A printed form was used for this affidavit. It was said in argument that the affidavit was read during the absence of counsel for the plaintiff at the trial of the case, though that does not appear in the record.

Section 5862, Revised Statutes, provides:

"On the trial of such issue, the order of probate shall be *prima facie* evidence of the due attestation, execution, and validity of the will or codicil."

Section 5863 and 5864, Revised Statutes, provide as follows:

"Section 5863. A certified copy of the testimony of such of the witnesses examined upon the probate as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial.

"Section 5864. The party sustaining the will shall be entitled to open and close the evidence and argument; he shall offer the will and probate, and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence; and rebutting testimony may be offered as in other cases."

Section 5864, Revised Statutes, provides that the party sustaining the will shall offer the will and probate, and rest, and, as we understand that statute, that means the order of probate, the judgment and decree admitting the will to probate, and does not cover the affidavit of witnesses filed; but Section 5863, Revised Statutes, seems to provide for the admission of the affidavits in case of the death or absence or incompetence of the witnesses. It says a "copy of the testimony of such of the witnesses examined upon the probate as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial."

In this trial there was no evidence that either one of these witnesses was dead or incompetent or absent, and we are of the opinion that the affidavits were not proper evidence upon the trial, and there was no error in excluding the one read. There

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would seem to be no reason why such a piece of testimony as this should be admitted upon the contest of a will in a trial before a jury. If the witnesses were living and competent, they should have been brought into court and subjected to cross-examination like other witnesses. It is to be presumed that the probate court acted upon sufficient evidence when the will was admitted to probate, and the judgment of that court admitting it to probate and the will itself are competent evidence; and that makes a case for the defendants until it has been overcome by the plaintiff.

It is claimed that the court erred in refusing to charge as requested by the defendants below. Several requests were made. Some were given, but most of them refused. I will speak only of one, request No. 7, which was refused, and which is especially relied upon as error:

“It is the right of every man, which right can not be taken from him, to do what he desires with his own, unless the disposition he makes violates some law; and after his death, neither court nor jury have the power to make for him a disposition of his property different from the disposition which he intended to make, upon any theory that such intended disposition was unjust and wrong.”

This request was perhaps taken from the charge of a court as reported in one of the law bulletins, or substantially so. With some qualification it would state the law correctly, but in our judgment, given in this form, it would be misleading to the jury, and is not a correct statement of the law. It begins: “It is the right of every man, which right can not be taken from him, to do what he desires with his own, unless the disposition he makes violates some law.” That leaves out entirely the question of the mental capacity or incapacity of the testator, and the question of undue influence. It is only a person of sound mind and memory—of testamentary capacity—who is under no restraint, who can make a will, as the statute, Section 5914, Revised Statutes, in substance provides. And to say to the jury that “it is the right of every man, which can not be taken from him, to do what he desires with his own, unless the disposition he makes violates some law,” where the two chief questions in the case were whether the testator was of unsound mind or not, and whether

he was acting under undue influence at the time he made his will, would be misleading, because it leaves out entirely the question of undue influence and mental capacity. The will of John Kettemann was to be sustained if he had sufficient mental capacity to make a will when he signed it, and if he was not under undue influence of such a character as would make the will not his will, but the will of some other person.

The request, after what I read, proceeds, "And after his death, neither court nor jury have the power to make for him a disposition of his properly different from the disposition which he intended to make, upon any theory that such intended disposition was unjust and wrong." That part of the request is probably a correct statement of an abstract proposition of law. The whole request is really an abstract proposition of law, and is not made to apply directly to the case on trial. But while the latter part is abstractly correct, still the jury would have the right to consider in a will contest, along with all other facts and circumstances, whether the will was unjust or wrong, in determining whether or not it was in fact the will of the testator. While a man has a right to make an unjust will, or one which in the common judgment of mankind is called wrong, still, in determining the question whether the paper writing is in fact the will of the man, the jury have the right to consider whether he would, if he was sound mentally, make such a will. On the whole, we think there was no error in refusing this request; and we find no error in the refusal to give the other requests which were refused.

The principal question in the case is whether the verdict of the jury was sustained by sufficient evidence. It is contended by the plaintiffs in error that the verdict was manifestly and clearly against the weight of the evidence, and for that reason that the judgment should be set aside. It is urged by defendant in error that the question of mental capacity and undue influence in a will contest is one peculiarly for a jury, and that where there is any testimony, or any considerable amount of testimony, tending to sustain either of these propositions, a reviewing court should not set aside the judgment of the court below affirming the verdict on the ground that the verdict is against the prepon-

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derance of the evidence only. The statute (Section 5861, Revised Statutes) itself is quoted, which provides that the question of the validity of the will must be submitted to a jury, and that the verdict shall be conclusive, unless a new trial be granted or the judgment be reversed or vacated. While it is true that the issue in a will contest can only be tried by a jury, in our judgment this means trial by a common law jury, as all cases that are tried to juries are tried. The court presides, and passes upon the questions of law. He instructs the jury as to the law, and the trial is conducted in all respects as any other trial. And the Supreme Court has held in *Wagner v. Ziegler*, 44 Ohio St., 59, that where there is no evidence offered by the plaintiff to overcome the testimony in favor of the will—no evidence tending to show that the paper was not the will of the testator—the judge may so instruct the jury and direct a verdict. The second paragraph of the syllabus is as follows:

“In the trial of the contest of a will, where the testimony introduced does not tend to prove the issue on the part of the plaintiffs showing incapacity of the decedent to make a will at the time the will was made, it is not error for the court, at the conclusion of the plaintiff's testimony, to direct the jury to find a verdict sustaining the will.”

The question of the respective duties of the jury and the court in a will contest are quite fully discussed in the opinion.

It is true that in will contests these questions of mental incapacity and undue influence are peculiarly questions for the jury, as many other questions are; as, for instance, questions of negligence; they are peculiarly addressed to the jury, and a jury is better able, probably, coming from all the walks of life, and familiar with the motives that actuate men in general and their conduct, to pass upon such questions than any other tribunal which could be constructed. But the statute simply provides that the verdict of the jury shall be conclusive unless a new trial is ordered or the judgment be reversed or vacated. So that we hold that a reviewing court has the power to review the testimony in a will case, and if the verdict is clearly and manifestly against the weight of the evidence, it has the power to set aside the verdict and order a new trial, as in other cases.

It is not possible, within the limits of this opinion, to review even briefly the testimony of each witness that was called in the trial below upon the question of mental capacity or undue influence.

John Kettemann, at the time he made his will, was forty-seven years of age. He had lived in New York and came to Toledo about the beginning of the civil war, and had lived in Toledo at the time he made the will, about twenty years. He had accumulated property worth about \$20,000. He was a merchant tailor, and a dealer in ready made clothing, and for a long time had a place of business on Summit street, near the Steadman monument. About the time the will was made he moved into Broadway. Prior to that time he had had his place of business in different parts of the city. He did quite an extensive business, and accumulated this property all by his own industry and frugality and shrewdness in business. At the time he made the will he had several houses and lots. At the time of his death in 1900 he had some thirteen houses and lots which he rented, collecting the rents from the tenants. It is claimed that his mind had become affected by the excessive use of intoxicating liquor, and further, that he was afflicted with epileptic fits, which affected his mind, and that his mind was so affected at the time this will was made that he was incapacitated from making a will.

Some of the witnesses called by the plaintiff testified that in their judgment he was mentally unsound about the time this will was made. Katie Metzger, the plaintiff, her husband, Conrad Metzger, and his brother, testified to that effect; and perhaps three others, including one of the name of Sass. These, when called, testified, after stating certain things upon which they based their opinion, that in their judgment he was unsound. According to their testimony he was at times in the habit of drinking or at times drank excessively, and became intoxicated; that he was a man of excitable temperament, and sometimes became very angry and used profane language, and swore at people generally, and sometimes called his customers thieves and robbers and rogues, especially when they attempted to beat him down in the price that he asked for his clothing; and sometimes, not very many times, but a few times, had fallen in one of these fits, as

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they were called. No witness testified that it was epilepsy that affected him, but the testimony shows rather that it was a heart trouble. On the other hand, some of the witnesses called by the plaintiff below testified that in their judgment Kettemann was of sound mind at and about the time the will was made.

One witness, Henry Schweibald, testifies on page 14 of the record, that he could not say that he was of unsound mind. Philip Hassenzahl, who was at one time county commissioner of this county, was called by the plaintiff. He testified that he had known Kettemann for thirty years, and dealt with him to a considerable extent; was often in his place of business; and that in his judgment he was sound. John N. Hauser, who had known him for many years, testifies that in his judgment he was sound. On page 42 of the record another witness testifies that he was "all right" so far as drinking was concerned, and did not drink to excess, so far as she knew. Another witness called by the plaintiff, Louis Wacker, testified that he never saw him drunk. Mr. Court Brown was also called by the contestant. He testified that he sold the deceased, in the later years of his life, bonds on different occasions; that he had bought them for himself and for others. On page 53 of the record he testifies, on cross-examination, as follows:

"Q. What kind of a business man was Mr. Kettemann at that time?

"A. Pretty shrewd, I should think.

"Q. Did he understand how to buy bonds?

"A. I think he did.

"Q. During all the time that you knew him he was a good, shrewd, practical business man?

"A. Why, yes; I considered him a very good business man."

I call attention to this witness as one called by the contestant when putting in her case. There were six of those called by the contestant, the substance of whose testimony was that Mr. Kettemann was of sound mind, and in fact, that he was attending to his business in the ordinary way during all those years.

The defendants below called altogether nineteen witnesses. There were some sixteen or seventeen of these who testified as to Kettemann's mental condition and capacity, and testified that

in their judgment it was sound, many of them having known him for a great many years. One of them knew him in New York when he was a poor journeyman tailor, working there by the day, before the war. He knew him when he came to Toledo about 1860, and knew him and associated with him all the time up to his death. So we have altogether about twenty-two or twenty-three witnesses whose testimony is that during all these years, so far as they knew him, including about the time he made this will—1880—and after he made the will, John Kettemann was of sound mind. On the other hand, we have the testimony of Katie Metzger, her husband and his brother, and three other witnesses who were called, making six in all, that in their judgment he was of unsound mind. So that, so far the witnesses considered numerically are concerned, those who testified that in their judgment John Kettemann was of sound mind by more than three times outnumbered those who testified that he was of unsound mind.

But these questions are not to be determined entirely by the number of witnesses. The jury had an opportunity to see them; but still it is a proper thing for consideration by the court, and it should be given great weight, that of all these people who were called, who had an opportunity to see him, and who talked with him, dealt with him, ate with him, and drank with him, twenty-three of them gave their judgment to the jury that he was of sound mind, and only six, three of whom may be called interested witnesses, testified that he was unsound. We should, however, consider in connection with this testimony incidents in John Kettemann's life and the lives of those who attack his will.

The plaintiff, Katie Metzger, lived with him after her mother's death in 1873, and in June, 1878, she was married, and she lived with her father at his request, according to the testimony, after her marriage to Conrad Metzger. Kettemann was acquainted with Bertha, his second wife, for some time before he married her, and, according to the testimony, received letters from her, and the courtship was going on apparently about a year. Before he married her, which was October 23, 1879, he ordered Katie Metzger, his daughter, and her husband,



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out of his house for some reason. He had conceived a dislike to Katie's husband, and did not care to have them live there any longer, and, according to the testimony, he had conceived a dislike, and a very great dislike, for some reason, to Katie Metzger, his daughter. The cause of this does not very clearly appear from the record. It does appear that Katie's marriage with Conrad was a hasty one, and, for some reason, Kettemann disliked Metzger. A child was born in Kettemann's house before they left. According to Conrad Metzger, the husband of Katie, Kettemann said to him about a week before he (Kettemann) married Bertha that he wanted him to get out of the house, and threatened if he did not get out, he would put him out; and he testifies that Kettemann threatened to shoot him, and raised a chair to strike him, calling him opprobrious names. Conrad then asked his wife whether she intended to stay or go with him. She said that she would go with her husband. Thereupon Katie, the plaintiff in the case, left the house of her father with her husband. A week after that he married Bertha Sacke, now his widow. Soon after Katie left she procured the administrator of her mother's estate to bring suit against her father to make him account for the property of her mother's estate. Her father was very much grieved by this suit, and, according to some of the testimony, wept that his daughter should sue him. He married Bertha within a week after the daughter left the house, and in the following spring—February, 1880—he made a settlement with his daughter Katie, the plaintiff in this case, of all matters in difference and dispute between them, and a paper writing was drawn up and signed by Katie and her husband, setting forth that settlement. It covers about a page of legal cap, and closes as follows:

"We do hereby forever release and discharge and acknowledge the full payment and satisfaction of all claims of every nature and description we or either of us have against said John Kettemann.

"E. P. RAYMOND,

*"Administrator of Barbara Kettemann.*

"CONRAD METZGER,

"KATIE METZGER."

That is dated February 9, 1880. There was in the paper originally, at the end of it this: "Growing out of the administration or heir of Barbara Kettemann." These words were erased, so that it appears that some one, presumably John Kettemann, insisted upon making this paper a full and complete release and satisfaction of all claims of every kind, without any limitation whatever. And in consideration of this settlement, John Kettemann paid to Katie at that time in money or its equivalent, about \$2,700, and gave her notes amounting to about \$1,000, out of which, however, she did not realize much, if anything. There was real estate in which he had curtesy, and which he continued to occupy during his life, and which at his death went to Katie, which was valued at about \$3,000; so that she got altogether about \$6,000 out of her mother's estate. After this paper was signed, John Kettemann said he had settled with his daughter forever, and wept, and said: "Sued by my own daughter." From the time that Katie Metzger left her father's house in the fall of 1879, she never entered it again, or visited him, or spoke to him, not even when he was in his last sickness; and he never visited her, or spoke to her, or had any relations with her of any kind. They were the same, as the witnesses said, as though dead to each other. The date of this settlement is February 9, 1880, and on March 4, following, he made the will in question, by the terms of which he gave all of his property to his wife, whom he had married the week following the departure of his daughter from his house.

That will stood as he then wrote it for more than twenty years, by the terms of which he gave all his property to the woman who bore him two sons, who survive him, and are parties to this suit. It appears, then, that between John Kettemann and his daughter there was a bitter quarrel. He was undoubtedly a man of strong prejudices, of high temper or passion. He was a man of a rather miserly character. After his death \$2,000 in money was found in the bank. He was parsimonious, stingy, somewhat, with his tenants and with those who dealt with him; and to be required by this suit to pay over to his daughter \$2,700 in money or its equivalent undoubtedly made

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a deep impression upon John Kettemann, and embittered him, to a great extent, toward his daughter. That she was embittered toward him is evidenced from the fact that she never visited him or spoke to him after she left his house during the twenty years that he lived. It is evident, as her conduct discloses, that in February, 1880, she regarded her father as a man of sound mind. She had this suit commenced against him shortly before that; she carried on negotiations with him through her attorney; she signed this paper of settlement releasing her claims against him. There was nothing in her treatment of him or conduct toward him then that indicated that she regarded him as of unsound mind.

According to all the testimony, Kettemann carried on his business until the day of his death. In the latter years of his life he did not do very much business. His store became somewhat dilapidated, and his stock of goods depreciated. But from the time he made this will until his death, covering a period of twenty years, he associated socially with men in general; he bought lands and built houses, and repaired houses; he rented them and collected the rents; he bought bonds and sold bonds; he ran his merchant tailoring establishment; and in all those transactions there is no evidence that he ever made a bad bargain; that he ever showed any mental incapacity to cope with the men with whom he dealt; that he ever failed to collect his rent or any other debt due him; the testimony shows that he collected promptly, and complained if he was not paid promptly. During this time, occasionally he became intoxicated, and an instance is testified to by witnesses showing his excitable character, when a dog that belonged to his former wife was lost, and he complained to the police, and threatened to kill himself if the dog was not found, and perhaps at that time flourished a pistol. He was excitable, undoubtedly, and sometimes became intoxicated, although he drank but very little away from his own home, but he had beer, and some witnesses testify, sometimes whisky in his own house. Taking all this testimony together, that offered by the plaintiff and by the defendants, and considering John Kettemann's life as testified to by his neighbors and acquaintances, down to the time of his death, we

were of the opinion that the testimony shows that he had at the time this will was made sufficient mental capacity to make a will. In fact, if the testimony of the interested witnesses should be disregarded, there is very little, if any, testimony in the record tending to show that he had not such capacity. It does not require the highest degree of mental capacity to make a will, as is said in 25 Enc. Law (1st Ed.), 970:

“A person who, at the time of making his will has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim upon his bounty and the manner in which it is to be distributed, has sufficient mental capacity to execute a will.”

We find no testimony in this record that shows that John Kettemann did not understand, in 1880, the property that he had or its nature; that he did not know, and was not able to carry in his memory at that time, the persons who might be the proper objects of his bounty. And the question always is, had he sufficient capacity, not to make a will in general, but to make *the* will. And we find that the will which he in fact signed as I have said, was of the simplest character—simply giving to his wife all the property that he had. And we are unable to find in this record—I think I would perhaps be justified in saying—any testimony, even taking the testimony of his daughter, the contestant, that establishes, if it stood alone, that John Kettemann did not have sufficient mental capacity to make this will in question. Taking the testimony offered by the contestant alone and her witnesses, in connection with the story of John Kettemann’s life, as disclosed by their evidence, we think the weight of it clearly is against the proposition that he had not sufficient capacity to make his will.

Upon the question of undue influence no direct testimony is offered. There is no testimony that his wife ever spoke to him in regard to this will. One witness testifies that her father said to him shortly after the marriage, that he ought to make a will so that Katie would not get anything; but undue influence must be of such a character that the act is not the act of the testator, but the act of some other person. I cite author-

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ities without reading: Schouler on Wills, Sections 228, 229; also *Monroe v. Barclay*, 17 Ohio St., 302, and all authorities there cited along that line.

The court charged the jury that they might infer undue influence from facts and circumstances. We do not think there was any error in the court's charge on this question of undue influence. Undue influence is usually shown by proving certain facts, and the question as to whether undue influence existed or not is to be determined from the facts as proven, the will itself, and all the facts and circumstances. It is seldom you have a witness testifying directly to acts of undue influence. In determining whether there was undue influence, the facts and circumstances surrounding John Kettemann when he made this will, his feeling toward his daughter, to which I have referred, his trouble with her, the lawsuit, the settlement, his feeling of affection toward his wife, were all to be taken into consideration.

The evidence shows that his daughter got from the estate of her mother about \$6,000. John Kettemann left an estate when he died of about \$15,000 to \$16,000, a widow and two children besides Katie; so that out of the common fund, the property of John Kettemann, and that of his first wife, Kettemann probably thought that Katie had really had her share of the general property of her father and mother. And taking all the things into consideration, we think the will which John Kettemann made in March, 1880, was a natural will for him to make at that time. He had settled with his daughter; he had paid over this money to her; he knew she would have this piece of real estate; she had brought this suit against him, and it was evidently his purpose to settle with her then and there for all time to come. And after he had done that, he made this will disposing of his property. We find nothing in the evidence to show that this will was the result of undue influence. I have gone over the testimony in this case at some length, for the reason that it is claimed these are peculiarly questions for the jury, and that their finding should not be disturbed, unless clearly and manifestly against the weight of the evidence; and we are of that opinion. But in the judg-

ment of the court, the finding of the jury is clearly and manifestly against the weight of the evidence. And when that appears, it is the duty of the court in a will case, as in any other case, to set aside the verdict and judgment and remand the case for a new trial. We find no other errors, but, in our judgment, for the reason stated, the court of common pleas erred in overruling the motion for a new trial, and the judgment will therefore be reversed.

*Harry E. King, J. J. Waldvogel and Elmer E. Davis*, for plaintiffs in error.

*Hamilton & Kirby*, for defendant in error.

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#### DEDICATION OF STREETS.

[Circuit Court of Lorain County.]

ANNA J. WRIGHT v. OBERLIN.

Decided, May 2, 1902.

*Streets—Dedication of—Unacknowledged Map Binding, When—Statute of Limitations—Does not Run Against a Municipality as to its Streets—Or in Favor of a Trespassing Lot Owner—Except Where Based Upon Equitable Estoppel.*

1. A property owner may make a dedication for street purposes by a map or chart on which he marks the streets and its width, or by allowing the public to use the ground for street purposes.
2. A map of a village which appears to have been followed, in all conveyances by the original grantors and by the authorities, and is of record among the deeds, is effectual to bind the parties making the dedication, though not acknowledged by them. Such a map is competent evidence for determining the width of a street.
3. Moreover, if it be shown that this map was before the Legislature when the village was incorporated, every property owner within the village is bound by it.
4. The statute of limitations does not run against a municipality as to its rights in the streets; nor does it run in favor of a trespasser upon a street or a highway.
5. Cases where it has been held that the statute runs against a municipality as to its streets, are cases where property owners would otherwise suffer a great hardship, and are based on the ground of equitable estoppel.

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CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This is a controversy in this court on appeal, over the width of a street, and as to whether the plaintiffs are occupying any part of the street as laid out and dedicated; and they bring this action to enjoin the village of Oberlin from laying its sidewalk further in upon this land, or further from the center of the street than it now is.

The county commissioners of Lorain county opened a country road, east and west through Oberlin, known as West Lorain street. This was before Oberlin became a village. And the plaintiffs claim—

First. The street is only sixty feet wide, as laid out in 1837.

Second. The land in question was never in the street.

Third. Adverse possession.

It is admitted that at the time the county commissioners established this road, that it was done regularly as the statutory laying out and establishing of a highway which passes through what is now the village of Oberlin.

That being ascertained, the street sixty feet wide and its location upon the ground is all that is to be determined in this case, unless, thus establishing the street, it takes in some of the plaintiff's land, and if it does then the question of the statute of limitations comes in, as to whether the land can be claimed after the persons owning this property have occupied it or had it within their premises for so long a period, from 1857, or on or about that time; not quite so long as that.

Now this is true, unless there has been a dedication of a street wider than that since. It is not claimed that there is any other statutory dedication than the one I have already named; but it is claimed there was a common law dedication of a street not only sixty feet wide but sixty-six feet wide, and it has been so used and accepted by the public and that that street is now of that width, and the village of Oberlin, or city of Oberlin I guess it is now, has a right to have the full width of that street, and hence has a right to lay its walks where it is contemplating, and the plaintiff has no right to the restraining order in this case.

There are various ways in which an owner may dedicate his property. He may dedicate it by allowing the public to use it, or may dedicate it by a chart or map in which he marks his streets, and their widths and the public grounds intended by him as such. And where there is a user, and where the public can be said to have accepted the street, that is sufficient to make a street.

In order that the defendant may overcome the establishment of this street by the county commissioners, it introduced in evidence here a map, which has been received by this court subject to exceptions to be passed upon at this time, as to whether it is proper evidence in the case or not. That map was made by Freeman, a surveyor, and it is on record; not among the maps of the county, but in the volumes of deeds. It is recorded, and a certified copy of it is brought into this case.

No objection is made by reason of the certified copy; the objection is that it is not competent in the first place. And the principal reason urged why it is not competent is, that it is not shown in this case that the original proprietors of these lands, the college, the owners who obtained them in large tracts and divided them up and sold them out in lots, that those owners ever in any way recognized this map. It is claimed the evidence shows it is not their map. That is, it don't show that they ever acknowledged it, that they ever required it to be put on record; that they ever made it or had it made for themselves. Well, if that is true, unless more than that can be shown, it is not entitled to go in evidence in this case as establishing the boundaries and the width of these streets.

Now to show that while the original proprietor may not have had this map made, may not have acknowledged it, may not have had it put on record, it is shown that a map known in the evidence as "Exhibit C," was made, which is exactly like this map, only showing more of the territory divided into lots, made at a later time, and which is really the same map. Evidently two maps could not be made independent of each other and made just alike as they are; one must be a copy of the other; and that in deeding all these lands in question and other lands of the college, the college and the public authorities there went by



that map, consulted it as to lots, as to boundaries, as to streets, and everything that pertained to the location of these different parts of lands upon the ground.

Now, that is one ground on which it is claimed the first map becomes competent, and the second is competent because that clearly under the evidence was recognized as the map of this ground by the original proprietors.

It has been said that that map "C," was made at too late a time to bind these parties, while the map purports to be made a month or two perhaps after the deed of this property was originally given (the first deed in 1857 that was) and evidently the data was taken either from that map or from the first map I have referred to, the map made by Freeman, a copy of which is introduced into this case.

Now, it don't make much difference whether a party makes a map himself and acknowledges it and puts it on record—those are the steps necessary for him to make a dedication, where it is had by map—or whether he acknowledges a map that some one else has put on, and follows it in his conveyances, it being shown clearly not only that this map has been followed or used in all these conveyances, but it is shown that it is the only map of the village of Oberlin when it was a village. That being true, it being the only map, and being a map followed, it is just as effectual to bind the parties who originally dedicated these streets and lands and public grounds as though they had acknowledged it in the first place for that purpose.

In the second place, this first map, the map of Oberlin, was evidently the only map that was before the Legislature when it passed the bill creating or establishing the village of Oberlin. And that act referred to a map that was evidently before the Legislature. And it is shown that this is the only map that was then in existence, and it was the only map that could have been referred to. That being true, that map being there established, and the Legislature incorporating the village according to that map, and the village agreeing to that map, everybody owning property was bound by it.

For these reasons we think that both of these maps are admissible in evidence.

Now these maps say, both of them, that this street in question is a street sixty-six feet in width—one hundred links. It is marked on the large map, which is the last one made in 1857—on the east end is marked one hundred links; on the north side of the college green it is marked one hundred links east of the campus; and it is marked one hundred links west of the campus. This establishes it, this map does, as a street sixty-six feet wide; the first map established it the same way.

As we have stated, the acknowledgment of these maps afterwards, and deeding according to them and following them, if they were so far adopted by the original proprietors, then that was a dedication of those streets sixty-six feet wide—one hundred links.

That being true, the only thing further is to see whether there has been an acceptance on the part of the public, and when we say on the part of the public we do not mean on the part of the lot owners. If the street was dedicated and the public has accepted it, that is all that is required.

The street was opened on the north side as a sixty-six foot street, and on the south side along by the college grounds or college green as it is called, it is a sixty-six foot street; then there is a jog in the street just beyond the college green of five or six feet, perhaps six feet, and that jog continues on the south side with the distance varying, growing less as Prospect street is approached, and beyond Cedar it grows less all the way out, but the narrowest place is in front of the property in question—of Miss Wright's property—which is only about twenty-five feet.

The witnesses testified that it is easy to be seen that there is a curve in the sidewalk, that it projects at this point along there, a long bend in it, that the west end of the sidewalk lies in on the lots and the east end also lies in on the lots further than the other, and the measurements confirm this testimony.

Now the monuments of this street are thoroughly established by the evidence of the surveyor and by those who have seen the monuments. There is a monument on the northeast corner of the college green; then there are monuments at the intersections of streets from that on, four monuments establishing the center

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line of this street, and this street as laid out in the first place was laid out as being on the original lot lines; but it is impossible now, the surveyor tells us, to tell where the original lot lines are.

The description of the original lots included monuments that have long since perished and been obliterated and no trace of them can be found. Therefore there is no way of establishing the original lot lines, except to establish them by the streets that are laid upon them. This street being laid upon the original lot lines it must now be conclusive under the facts and the facts that are absent and can not be had by the court—it must now be conclusive that those monuments in West Lorain street are on the lot lines; and that lot line and those monuments we can not change. If the court could upset long established monuments and surveys of that character we would soon get landholders into great confusion. It would be impossible. As I stated, this street along the north side has been occupied as thirty-three feet; the line of occupancy has been thirty-three feet, uniform from the center as is established by those monuments; on the south side it has varied. We think, therefore, it is conclusive in this case that there has been a user of this street as a sixty-six foot street sufficiently to make a complete dedication of it for all uses, and we therefore say that this is a sixty-six foot street lawfully.

The question remaining is as to the statute of limitations. We are pointed to three cases (*Cincinnati v. Church*, 8 Ohio, 298; *Williams v. Presbyterian Socy.*, 1 Ohio St., 478; *Cincinnati v. Evans*, 5 Ohio St., 594), wherein the Supreme Court of this state has held that the public may be estopped, or the statute of limitations may run against the public in its use of a street.

Then we are pointed to cases, an equal number, a greater number we will say of the latest cases, where the Supreme Court has held that the public can not lose its rights in the street.

By some authorities it is held to be a nuisance to occupy any part of the public highway, and that repeating a nuisance from day to day and time to time, the statute can never run against a public nuisance; and if that is the law, if that is the ground,

why it is well taken, for that doctrine is well established in the law of nuisances.

Then it is claimed by some that the Supreme Court has never yielded this doctrine; for it has come to be thoroughly conceded, except in cases where it would work an extreme hardship by reason of the owner of the adjoining lands having built out upon the street very expensive buildings, and he may be greatly injured by having to cut them down, and the public good stood by and did not interfere; and some authors put it upon the ground of equitable estoppel; and it is claimed by some that this marks the distinct difference between the two classes of cases in this state.

Now in this case it has been argued that the real difference between these two holdings in this state, these two opposite holdings—apparently opposite—is this, that a county is only a *quasi* corporation representing the state, and the statute never can run against the state, and the county so representing the state as it does, the statute of limitations can not run against the county, and therefore a highway out in the country is distinguished from a street in the city; that no rights can be gained in it, on the ground it is the state that is being interfered with through its agent, the county commissioners of the county.

But a municipal corporation has two existences; one its individual rights and another its public rights. In its private rights and obligations it has always been held that the statute of limitations will run against it, but in its public rights, wherein it represents the state, it is held that the statute of limitations does not run against a city any more than it would run against a county or against the state.

Now in so far as the city exercises its dominion and jurisdiction over the streets of the city, it is one of its public duties; it is a duty that is placed upon it as the agent of the state, and not in its private right, or by reason of its private existence. That being true as to its streets, it stands in precisely the same situation that the county does to the highway. Hence the argument don't hold good.

We believe that some of the cases in this state that have held that the statute of limitations may run against a municipality

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do cause a great hardship, and while they have not been overruled, and have been recognized in later decisions, yet I believe for one, and have so stated heretofore from the bench, that the real ground of those cases is on the ground of equitable estoppel, and that the doctrine to-day is in this state, thoroughly established outside of these cases, as an independent principle of law from those, that where any one trespasses by reason of fences or shrubbery or trees or anything of that nature upon the highway, whether it be a street or highway in the country, that the party can not plead the statute of limitations.

Now it is said this is going to work a great hardship, but the evidence in this case shows that the plaintiff has more land than the land she purchased, aside from the street claimed by the village or by the city. If the city gets all the land it claims there, she still has two feet more from rear to front than her deed calls for; she loses nothing; it seems like losing something, but it is really losing nothing, and the shrubbery that is along there as shown by the evidence amounts to mere nothing. That part of it that is prized at all can be easily set back. There are trees there; if they establish this as a sixty foot street that brings those trees right in the center of the walk, more nearly in the walk than it would to make it the width claimed by the city.

In establishing it by the claim of the city it would seem hardly necessary to destroy the trees, from the evidence here, because while they will lie in the walk, it will only be in the edge of the walk. You can not go into any town or city hardly that you do not see trees standing in that way; it is a common thing, and no one objects to it; they think more of the shade than they do for that little bit of walk.

We think, therefore, the plaintiff has not shown any right to recover in this case, and her petition is dismissed. A decree may be taken accordingly.

*D. J. Nye, C. A. Metcalf and A. Z. Tillotson, for plaintiff.*

*E. G. Johnson and W. B. Bedortha, for defendant.*

**NUISANCE IN A STREET BY PERMISSION OF COUNCIL.**

[Circuit Court of Lorain County.]

**ELYRIA V. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.\***

Decided, May 27, 1902.

*Municipal Corporations—Control of Council Over Streets a Continuing Power—Agreement by Council to an Obstruction Seriously Interfering with Use of Street Invalid.*

Municipal authorities can not contract in such wise that a nuisance may be maintained in the street, and notwithstanding it may have been erected in accordance with an agreement entered into with council, injunction will lie against the further maintenance of an overhead railroad bridge abutment, which occupies a part of the street and is seriously interfering with the use of the street.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

The case of the city of Elyria against The Lake Shore & Michigan Southern Railway Company is tried to us on appeal from the judgment of the court of common pleas.

The action is brought by the city of Elyria against the defendant railroad company, the purpose of which, and the prayer of which is for an injunction to restrain the defendant from further continuing and maintaining certain abutments which it has built at the crossing by the railroad of West River street in the city of Elyria, the point being where West River street is intersected by Huron street and West Bridge street, and for an order requiring the railroad company to remove those abutments.

The plaintiff, the city of Elyria, is the successor of the village of Elyria, and is, as the village was, a municipal corporation.

The defendant is a corporation owning and operating a railroad; its tracks pass through what is now the city of Elyria. The railroad company for more than fifteen years last past has maintained its railroad track passing through this municipality, and its track during all that time has crossed West River street at the intersection of West River street with Huron

\*Affirmed by the Supreme Court, January 19, 1904 (69 Ohio State).

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street and West Bridge street. The general direction of the railroad track is east and west, crossing the street, which runs north and south. Up to about February 20, 1890, the track of the railroad was maintained at the street grade. At the date last named the defendant changed its crossing at the point to an overhead crossing, to do which it put in large stone abutments on both the east and west sides of the street. These abutments narrow the street at this point to a width of forty feet; that is to say, it narrows the available traveled way of the street to a width of forty feet. The width of the street as it existed prior to this time was sixty-six feet.

There was some evidence introduced tending to show, or it was claimed tending to show that the street was but sixty feet, but we find from the evidence that the street, at the time to which attention has been called, was sixty-six feet in width. Each of these abutments from north to south is about twenty-nine feet in length.

There is a sidewalk along the easterly abutment above mentioned six feet in width. The easterly abutment above mentioned extends into the street as it existed prior to the making of such abutment but a little more than five feet at one point, and at the point where it encroaches least upon said street the encroachment is considerably less. The entire encroachment, except as made by the easterly abutment already mentioned, is of course made by the abutment on the west side of the street.

Since the construction of these abutments a street railroad has been laid along said West River street, under a franchise granted by the city of Elyria, and said street railroad is now in full operation, running cars at frequent intervals along said street and between said abutments.

The change of the crossing of defendant's road at the point named from a grade crossing to an overhead crossing became necessary for the proper use and operation of said railroad, but there was no imperative necessity for placing the abutments nearer to each other than the full width of the street, sixty-six feet.

Before the railroad company made the change at said crossing it entered into what is in terms an agreement with the municipal authorities as to the manner, terms and conditions upon which said change might be made, and the construction of the abutments heretofore mentioned, and the way in which they are now maintained, is in substantial compliance with the terms of said agreement.

If the municipal authorities had the lawful right to make this agreement in such wise that the municipality should forever be bound by it, then the petition must be dismissed.

It is said on the part of the railroad company that such authority is vested in the municipal officers by Section 3283, Revised Statutes, which reads:

"If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities owning or having charge thereof and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals."

Without reading further, that includes so much of the section as it is claimed authorized the making of this contract by the municipal authorities with the railroad company; and that the agreement constitutes a binding contract between the municipality and the railroad company.

This section has been construed in numerous cases. In *Railroad Co. v. Defiance*, 52 Ohio St., 262, the section was construed, and the seventh clause of the syllabus of that case reads:

"An ordinance which in terms authorizes a railroad company to erect new bridges of a specified description over the track of its railway where it crosses designated streets, the bridges to be kept in repair by the company, does not divest the municipal authorities of their control over the streets, nor



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impair their power to improve the same, nor entitle the railroad company to perpetually maintain the bridges so constructed; but the ordinance and privilege granted by it are subject to a proper exercise by the municipal body of its power to improve the streets, and make such changes in the grades as may be necessary to subserve the public interest."

In the opinion in the case pronounced by Judge Williams this language is used, beginning on p. 308:

"It may be observed that the extent of the authority conferred by this statute on municipal corporations is to agree with railroad companies upon the manner, terms and conditions upon which a street, etc., may be used and occupied by a railroad, 'if it be necessary in the location' of the railroad for any part of it to occupy said street, etc., and then they may agree for the use of so much of the street only as is necessary for the purposes of the railroad. This limitation is manifest from the provision that if the parties are unable to agree, the company may appropriate so much of the street as is necessary for the purposes of its road. The object of the appropriation is to acquire such use of the street, etc., as could have been granted by agreement; and no greater use can be obtained in the one mode than in the other; the right acquired is either limited to the use of so much of the street as may be necessary for the purposes 'of the railroad.' The statute, we think, does not contemplate the destruction of the street, or the cessation of its use by the public, or its withdrawal from the control and supervision of the proper municipal officers; nor is authority found in it for any agreement having such results. On the contrary, the statute recognizes the street so burdened with a railroad as a 'public street,' with all that term imports."

Then attention is called to the next section, Section 3284, Revised Statutes, which requires when a street or stream, etc., shall be crossed by a railroad, by the track of a railroad, and it becomes necessary to divert the same, that is the street or stream, whatever it is that is crossed, that the company shall restore the street or alley or stream that is diverted to its former state of usefulness. That is, it shall be required to place the road or stream or whatever it has thus crossed or diverted from its location without unnecessary delay in such condition as not to impair its former usefulness. And in the opinion Judge

Williams holds that this is to be read in connection with the other section.

The same case, the case to which attention has just been called, of *Railroad Co. v. Defiance*, went to the Supreme Court of the United States, and is reported in *Wabash Railway Co. v. Defiance*, 167 U. S., 88. On p. 486 in the opinion of the Supreme Court, delivered by Mr. Justice Brown, commenting on two Sections 3283 and 3284, Revised Statutes, he uses this language:

“Reading these two sections together, it is open to doubt whether Section 3283 is not confined to cases where the railroad runs along and upon the street, road or alley, in which case some kind of contract or agreement with the municipality would seem to be almost necessary for the mutual accommodation of the railroad and the public, who desire to retain the use of the street for ordinary travel. The matter of crossing the street, however, is treated by Section 3284 as one of the necessary incidents of railroad construction; and all that is required is that the company, after having made the crossing, shall replace the road in such condition as not to impair its usefulness.”

A further discussion of the two sections is found in *Zanesville v. Fannan*, 53 Ohio St., 605. On p. 614 the court say, speaking of the duty imposed by the statute upon the municipal authorities to keep the streets open and free from nuisance:

“And those powers and duties continue when a railroad company has placed its tracks in a public street, whether they were so placed under permission granted by the municipality or under an appropriation for that purpose. In neither event are the municipal authorities divested of their powers, nor absolved from the performance of their duties. Nor does Section 3283 contemplate that a railroad company, in the use of a street for the purposes of its road, under a right acquired in either of the modes provided, may destroy the same or create nuisances therein. On the contrary, it contemplates that the company shall exercise its rights with proper regard to those of the public in the street, and that the street and its uses by the public shall be preserved and protected, with such additional use as may be necessary in the proper operation of the railroad, which is itself a means of public use. If the permission to

occupy the street be granted by the municipal authorities, they may and should prescribe such reasonable regulations and conditions as will prevent the creation of nuisances and preserve and best protect the free and full use of the street by the public."

Without reading further authorities, though there are many in line with these which are cited by counsel in their briefs, and quoted from, we hold that by this agreement entered into between the municipal authorities of Elyria and the railroad company, the municipal authorities were not relieved from the obligation to keep the streets open and free from nuisance, nor did the railroad company acquire the right to so occupy the street as to constitute a nuisance to the public.

In one of the cases it is said that the public authorities could not make such contract as to take away from the municipality the right to have the streets used for the purposes of a street.

The evidence is such that it can not be doubted that the construction of these abuments, as they are, constitutes serious interference with the use of the West River street or the streets which there intersect. And under the statutes which require the municipal authorities to keep the streets free from nuisance, and the proposition that the city can not contract in such wise that nuisances may be permitted in the street, it seems clear that the plaintiff is entitled to the relief here sought to the extent that it is necessary to relieve the street from such obstruction as seriously interfere with the use of the street by the public.

The encroachment, as has already been stated, is chiefly on the west side of the street, and if the abutment there should be removed to the line of the street, the street would probably be sufficient for all the present needs and rights of the public, and we have come to the conclusion, therefore, to require the railroad company to remove that abutment which is on the west side back to the line of the street, and a decree may be entered here as in the court below.

*W. W. Boynton and F. M. Stevens, for plaintiff.*

*E. G. Johnson, for defendant.*

**BENEFICIAL INSURANCE.**

[Circuit Court of Hamilton County.]

GRAND LODGE OF A. O. U. W. v. MARY J. BUNKERS.

Decided, April 24, 1902.

*Insurance—In the Ancient Order United Workmen—Officers of Can Not Waive Constitutional Provision—Denying Membership to One Engaged in the Sale of Intoxicating Liquors—Modification of Special Charges—Estoppel or Waiver, Though Not Pleaded, Available, When.*

1. Where the constitution of a fraternal order provides that no person shall be admitted to beneficial membership who is engaged in the sale at retail of intoxicating liquors, the officers of the order are without power to waive this provision.
2. In a reviewing court a party may avail himself of the legal effect of facts which, though not pleaded, constitute an estoppel or waiver, and which appeared in the trial below.
3. Complaint can not be made of the modification of special charges, where the only reference to such modification in the bill of exceptions is the exception of counsel thereto, and his statement as to wherein they were modified.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

Heard on error.

The original petition of the defendant in error stated a cause of action upon a certificate of membership issued by the plaintiff in error to George E. Bunkers. The first defense was that said member, being a saloonkeeper, was ineligible, under Section 74 of the constitution, to membership; that he stated in his application that he was a painter by occupation; that said statement was willfully false and fraudulently made; that the certificate would not have been issued but for such statement, and that the local lodge and the grand lodge had no knowledge of the falsity of such statement. A verdict and judgment were rendered in favor of the defendant in error.

1. The first alleged error that we will notice is the refusal of the court to allow the witness, Fred. Dhonau, the grand master of the grand lodge of Ohio, to answer the following question:

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“State to the jury, if you know, when you signed the particular certificate which was subsequently delivered to the husband of plaintiff in this case?”

It is sufficient to say that, although counsel for plaintiff in error attempted to state what he proposed to prove by the witness, the record does not disclose any definite time which the witness would say was the date of signing.

2. It is claimed that the court erred in striking out the answer of the witness, Burton R. Kob, that “Geo. E. Bunkers, on the evening of his initiation, said that he did not remember to whom he had sold his saloon,” but the answer so stricken out is as follows:

“Why, who did you sell your saloon to, George?” He thought for a while. I put the question a second time, and he couldn’t remember the man’s name he said he sold out to.”

It will be observed that this is not a statement that George E. Bunkers *said* he couldn’t remember, but merely an impression or opinion of the witness that Bunkers couldn’t remember.

3. The grand master also testified that he knew at the time the certificate was issued that Bunkers was a saloonkeeper, and had been for several years prior thereto, but that he did not know until September, 1899, that the certificate was issued to Bunkers, although he himself had signed the certificate dated July 13, 1899.

The court, upon motion of the defendant in error, struck out that part of his testimony relating to his knowledge when Bunkers became a member. This was not error, as the testimony would vary and contradict the terms of the very instrument signed by the grand master, and upon which the action was based.

4. The facts tending to prove an estoppel or a waiver first appeared in the trial of the case and from the evidence offered by the defendant below. It was competent therefore for the plaintiff below to avail himself of their legal effect, although not having pleaded them in her reply. *Bank v. Flour Co.*, 41 Ohio St., 552, 559, 560.

5. It is claimed the court erred in modifying the four special charges requested by plaintiff in error, before giving them to the jury; but the bill of exceptions contains the following recital: "And the following charges asked by the defendant are given."

While it is true that counsel for plaintiff in error excepted to the charges given and as modified by the court, and also stated in what particulars they had been modified, there is no other statement in the bill showing that the court modified the charges. This court is bound by the record made, and can not therefore consider the exceptions to the special charges given at request of plaintiff in error.

6. The court charged the jury in a special charge as well as the general charge in substance that although they found that at the time of the issuance of the certificate Geo. E. Bunkers was engaged in the saloon business, if the lodge or its agents waived that fact, plaintiff could recover.

Section 74 of the constitution provides that—

"No person shall be admitted to beneficial membership in the order \* \* \* unless he be of good moral character \* \* \* and not engaged in the sale of intoxicating liquors at retail."

To admit one engaged in the sale of intoxicating liquors at retail to membership would be a violation of this fundamental provision of the order, which is of the substance of the contract, and although the chief officer had knowledge of the fact he was without power to waive such provision. *McCoy v. Insurance Co.*, 25 N. E. Rep., 289 (152 Mass., 272).

The plaintiff in error being a fraternal order, is exempt under Section 3631-11, Revised Statutes, from the provisions of Section 3625, Revised Statutes.

Judgment reversed and cause remanded.

*McKenney & Belville* and *Patterson A. Reece*, for plaintiff in error.

*Bromwell & Bruce* and *Wm. R. Medaris*, for defendant in error.

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**MEASURE OF LOSS THROUGH MISTAKE IN A TELEGRAPH MESSAGE.**

[Circuit Court of Summit County.]

POSTAL TELEGRAPH CABLE CO. v. AKRON CEREAL CO.

Decided, January Term, 1902.

*Contract—Can Be No Breach of—Where Never Fully Entered Into Because of a Misunderstanding of Terms—Due to a Mistake in a Telegraph Message—Measure of Damages Against the Telegraph Company.*

There can be no breach of a contract which, because of a misunderstanding between the parties as to its terms, was never made; and where the misunderstanding was due to a mistake in the transmission of a telegraph message, the measure of damages against the telegraph company is not the amount of loss sustained by the sender of the message through failure to fix prices as he had intended, but the amount of loss actually sustained by him in connection with the negotiation.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The case of the Postal Telegraph Cable Company against the Akron Cereal Company comes into this court upon a petition in error, seeking to reverse the judgment of the court of common pleas.

Suit was brought in that court by the defendant in error against the plaintiff in error upon this state of facts:

One N. A. Bosch, of Maastrich, Holland, had some correspondence with the Akron Cereal Company, of this city, in relation to the purchase by the former from the latter of certain goods known as distillers' grits. This correspondence was prior to November 29, 1898. By such correspondence it was known to the cereal company that if Bosch wanted to wire it asking price for such grits he would use the word "cotation" (spelled a little after the Holland way), meaning "quotation," but the word "cotation" was used. But, further, it was known by both parties that the word "sack" meant a certain quantity of the grits. With this knowledge on the part of both, Bosch, on No-

vember 29, 1898, cabled the cereal company in these words: "Cotation 5,000 sacks." This meant to both the sender and the cereal company, "At what price can you furnish five thousand sacks of distillers' grits?"

To this, on the next day, November 30, the cereal company sent to the Postal Telegraph Cable Company for transmission by cable to Bosch the following: "63dx4 guilders cif Rotterdam December January." This meant to the sender that it would furnish five thousand sacks of distillers' grits, including cost of insurance and freight, at Rotterdam, Holland, at six and three-quarters guilders per sack, to be delivered in December, 1898, and January, 1899; and if it had been sent as it ought it would have meant this to Bosch. The letters "dx" between the figures "3" and "4" meant, both to the sender and to the telegraph company, that a hyphen was to be placed between these two figures.

The telegraph company undertook to transmit this as received by it to Bosch at Maastricht. Instead, however, of sending it as delivered, it sent a message to Bosch in these words: "634 guilders cif Rotterdam December January." This was, and might well be, understood by Bosch as offering to send the five thousand sacks at the price of 6.34 guilders per sack instead of six and three-fourths, that is, 6.75 per sack, so that by the mistake of the telegraph company the price given to Bosch was 41-100 guilders less than that given by the cereal company to the telegraph company. This, on each one thousand sacks, would make a difference of four hundred and ten guilders, or, under the evidence in this case that a guilder is worth forty cents of our money, it would make a difference of \$164 per thousand sacks.

Assuming that the telegraph company was the agent of the cereal company in such wise that what it said to Bosch should be held to be the act of the cereal company, and, in our view of the case, that assumption can be made and do no prejudice to either party; no discussion is had as to an argument made here upon the question of whose agent the telegraph company was.

An unconditional acceptance of this proposition would have constituted a contract binding the cereal company to furnish to



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Bosch five thousand sacks of grits at \$164 less per thousand sacks than the price it really fixed for the goods; that is to say, that would be true if the figures "634" meant (and they properly meant) 6.34. Some discussion was had here as to whether Bosch was justified in understanding the figures "634" to mean 6.34 guilders. As has already been said, it was agreed between the parties, or, if it has not been stated, it was agreed between the parties that the price should be given in guilders.

Now, since six hundred and thirty-four guilders would be certainly so much that Bosch must have known it did not mean that, there can be little doubt that it was properly understood by Bosch as meaning 6.34 guilders. That being true, what has already been said, that if there had been an unconditional acceptance of this offer, and assuming that the telegraph company is the agent of the sender, the cereal company would have been bound to furnish five thousand sacks at 6.34 guilders per sack.

On December 3, 1898, Bosch cabled the cereal company in these words: "Accept 1,000 each month." This meant to each of the parties that Bosch would take one thousand sacks of grits in December, 1898, and one thousand in January, 1899, at an agreed price. To Bosch it meant at 6.34; to the cereal company it meant 63.4, or seventy-five hundredths. If this modified proposition to take two thousand sacks instead of five thousand sacks in December and January had been accepted without explanation or condition, assuming, as before, the agency of the telegraph company, the cereal company would have been bound to deliver the goods at 6.34.

The cereal company did not have the grits on hand, but decided to furnish the two thousand sacks at 6 3-4 guilders, which it understood to be the agreed price. Thereupon it ordered them from the Cumberland Mills, at Nashville, Tennessee; and at once, on the day of this last cable message, it wrote Bosch a letter, put it into the mail at Akron, and in that letter the cereal company said: "We beg to confirm our cable to you quoting 6 3-4 guilders per hundred kilos in one hundred kilo bags for our choice white brewer's grits cif Rotterdam; also to confirm your acceptance received this morning of one thousand bags each month, meaning December and January shipments. We have,

therefore, entered your order for one thousand sacks," etc. That letter was received by Bosch on December 15, 1898. Whatever notice then Bosch ever received that the cereal company had accepted his offer for one thousand sacks each for the months of December and January he got by this letter notified him that the acceptance was at 6 3-4 guilders instead of 6.34.

It is said that when the cereal company mailed that letter it thereby accepted the modified order for two thousand sacks instead of the proposition to furnish five thousand sacks, and that there was no change in the price, and that, therefore, it should be held that the cereal company became bound to furnish the two thousand sacks at 6.34.

Suppose, instead of mailing that letter, the agent of the cereal company, by some means, could have talked with Bosch on that day, and said to him: "Mr. Bosch, we had notified you we would furnish you five thousand sacks at a price; we have now got your order for two thousand sacks at a price, and we will let you have them, that price being 6 3-4," all in one conversation, all at the same time, is it possible there would have been any binding contract on the cereal company to furnish at 6.34, when at the very time they say to Bosch, we propose to furnish you the two thousand sacks that you want at the price that we have heretofore offered you, to-wit, 6 3-4? It seems clear that Bosch would not have been able to enforce that contract, that he could not have recovered damages if the cereal company refused to furnish those goods at less than 6 3-4.

Bosch wrote a letter on December 3 to the cereal company. That letter is found in the bill of exceptions. It is somewhat difficult to read, and it is not necessary to read it. It is a letter in which he, on that same third of December, stated to the cereal company that he begged to confirm his order by cable for two thousand sacks at 6.34. That was received by the cereal company on December 17.

Now, if there was ever a contract between the cereal company and Bosch, it seems very difficult to fix any time when that contract was completed. First, Bosch says, "What will you furnish me five thousand sacks for?" The cereal company said—what was received by Bosch said (giving the most favorable interpre-

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tation to the cereal company)—“6.34.” Bosch said, “I will not take five thousand sacks at that price, but I will take two thousand sacks at the price you have fixed,” Bosch having got it that the price fixed was 6.34. The cereal company said, We have your order for two thousand sacks, and we will let you have them at our price, 6 3-4. Bosch said, “I won’t take them at that price, but I insist on the 6.34.” When was the contract completed between Bosch and the cereal company? We think it clear there never was a contract completed between them. There never was a time when Bosch could have held the cereal company under a contract to furnish two thousand sacks at 6.34. Up to this time, although the cereal company had determined that it would furnish, supposing it was to get 6 3-4 for the goods, and had ordered them, no goods had been shipped at all.

Several days after both parties knew of this mistake. The cereal company sent on the goods, and it thereafter settled with Bosch at 6.34, Bosch insisting that he had a right to them at that price; although, if we are right, no contract had been made by which it was bound to do it, it did it; furnished the goods at 6.34, and now sues the telegraph company for the difference, and recovered just the amount, \$164 per thousand sacks, which, under this evidence, would be the difference between the price at 6.34 and 6 3-4.

This case was tried to the court without the intervention of a jury, but the measure of damages allowed by the court is determined by the difference between the price of these goods at 6.34 and the price at 6 3-4.

The law is well settled, that for its negligence to send messages as delivered to it, a telegraph company is liable in damages, if damages are thereby occasioned. Of course, this does not mean it is an insurer, but it means it puts upon the company the burden of showing a suitable and good reason why it did not send what was furnished it; as is said in *Western Union Tel. Co. v. Griswold*, 37 Ohio St., 301, it may show possible that by act of God or the public enemy it was unable to send, atmospheric conditions may have rendered it impossible but, *prima facie* the company is liable for the mistake it makes; but it is liable only

for the damages which result naturally, proximately and necessarily from such mistake as is made.

In this case there is no question about the negligence of the telegraph company. It was clearly negligent, for it is shown here that it understood that the message as it reached it meant 6 3-4, and it did not send it that way.

The cereal company here was damaged at least to the extent of what it paid for the message which was sent. It may have been damaged beyond that for something else it did, but, if so, there is no evidence as to anything about it. We don't know, it might not have been, and possibly there is something else by which it was damaged, possibly the expense of negotiating with the Cumberland Mills for the goods. However, there is no evidence about that here.

The court was in error in its measure of damages. The measure of damages was not to be determined by the difference between the price that Bosch understood the goods to be and the price the cereal company understood the goods to be, because there never was any contract between the cereal company and Bosch that it should deliver those goods at that price of 6.34.

Our attention is called to the case of the *Western Union Tel. Co. v. Griswold*, *supra*. Counsel in this case are very familiar with that case. It is clearly to be distinguished from this. In that case a message was sent by the agent of Griswold & Company from Canada asking if he should purchase flaxseed, a certain number of bushels at \$1.50 per bushel. The telegraph company, instead of putting that \$1.50 made it one five. Griswold & Co. immediately notified their agent to buy the goods. Here is the answer. "Yes, if seed is prime, and we can hold at London until spring."

Attention is called to that in the argument of this case, suggesting that here was not an unconditional acceptance of an offer. This was an instruction by Griswold & Co. to their own agent, in answer to a dispatch which their agent had sent them, and on which, of course, he was authorized to act. We think it is very clearly to be distinguished from this case. In that case the telegraph company was held liable.

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Judge Boynton, in delivering the opinion for the majority of the court, announced three propositions—perhaps four.

First. That the verdict was sustained by sufficient evidence. That he held as a fact.

Then, as propositions of law, he held that the special agreement that is shown in the case, whereby the company says it will not be liable unless the message is repeated, was not binding; that the company could not relieve itself from its own negligence by that agreement; that did not relieve the telegraph company from the consequences of its own negligence.

Second. As a matter of law, Judge Boynton announces that the failure to transmit the message as delivered is *prima facie* evidence of negligence.

Third. As a matter of law, he holds that that message was not obscure; that is all the propositions of law.

Judge Okey dissented in this case, and he said that the verdict was not supported by sufficient evidence, and taking that view of it, he then discusses what the law would be in case the verdict was not supported by sufficient evidence.

Claim was made that Cowpland, the agent of Griswold & Company, had notice of the erroneous message, or of the fact that the message was erroneous before he bought a bushel of flaxseed. That was denied on the other side. Judge Okey says that it is clear that Cowpland did know before he bought any seed, and then he goes on and discusses what the law would be in that case, and nothing he announces in that regard is at all at variance with the opinion of the court as delivered by Judge Boynton.

Attention is called to *Ayer v. Telegraph Co.*, 79 Me., 493 (21 Am. & Eng. Corp. Cases, 145), where there was a mistake made in a message about some lath. Without stopping to read the case, it shows there was a contract completed between the parties, and that being true it was held that the telegraph company was liable for the mistake it made in its message.

The case referred to in 25 Enc. Law (1st Ed.), page 890, *Western Union Tel. Co. v. Shotter*, 71 Ga., 760, shows that there was a contract complete between the parties; that the contract

was different from what it would have been, because of the negligence of the telegraph company.

It is true that in neither of these cases was there a performance until after the mistake was known, but there was a complete contract between the parties, and that being binding, the party who lost by it held the telegraph company.

As being applicable as well to cases of this sort involving telegraph messages as to any other contracts, the rule of law seems to be such as is stated in 2 Townsend on Negligence (2d Ed., 1886), 858, par. 20, where it is said that the law, for wise reasons, imposes upon the parties subjected to injury for the breach of a contract the active duty of making reasonable exertions to render the injury as light as possible. Public interests and sound morality accord with the law in demanding that, if the injured party through negligence or willfulness, allows the damage to be unnecessarily enhanced, the increased loss justly falls upon him.

Applying that principle here, although it was not a contract as between the parties, yet there was to be some loss, at least the expense of the message, and certainly a loss to the cereal company if it was mistaken or had been led into making a contract at \$164 per thousand sacks less than what the property ought to have brought, but before any contract was made and before any goods were delivered it knew of that.

Now, neither good morals, it seems to us, nor sound reason, would allow the company to go on and furnish those goods and charge it up to the telegraph company.

We think there was error in the judgment of the court below, and it is reversed, and the case remanded to the court of common pleas.

*Allen & Cobbs*, for plaintiff in error.

*Slabaugh & Seiberling*, for defendant in error.

**LANDLORD AND TENANT.**

[Circuit Court of Hamilton County.]

**SHINKLE, WILSON & KREIS CO. v. ROBERT J. BIRNEY ET AL.\***

Decided, February 8, 1902.

*Landlord and Tenant—Damages Resulting from Collapse of Building—  
Knowledge of Latent Defects—Doctrine of Caveat Emptor Appli-  
cable.*

Where a tenant has equal opportunity with his landlord for discovering latent defects in the building he is occupying, the doctrine of *caveat emptor* applies, and knowledge of such defects can not be charged to the landlord more than to the tenant.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

Heard on error.

Conceding the law to be as stated by counsel for plaintiff in error that "if there is a concealed defect that renders the premises dangerous, which the tenant can not discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for the injury which results from his concealment of it," still there is no finding by the court of common pleas that the defendants in error had or ought to have had knowledge of the defects causing the damages, nor does it find that they knew how long the defective timbers had been in the building, which, together with other facts, was necessary to show that by the exercise of ordinary care they would have discovered the defects complained of.

If the plaintiff in error had equal opportunity with the defendants in error to discover latent defects, the rule of *caveat emptor* applies.

There being no more definite knowledge of defects on the part of defendants in error than that possessed by plaintiff in error, there was no greater duty imposed on the former to make the prescribed tests by "tapping or boring."

Judgment affirmed.

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\*Affirmed by the Supreme Court without report, May 25, 1903.

The relief asked in the cross-petition in error can not be granted, for the reason that the bill of exceptions is incomplete, and for the further reason that this court is not authorized to amend the findings of fact.

*Robert Ramsey*, for plaintiff in error.

*John S. Conner and Harrison & Aston*, contra.

### FORCIBLE ENTRY AND DETAINER.

[Circuit Court of Lucas County.]

GEORGE HELLER v. MARY BEAL.

Decided, February 3, 1902.

*Justice of the Peace—Proceedings Before, in Forcible Entry and Detainer—Bill of Exceptions—Competency of Evidence Alone Open to Review—Notice to Vacate and Proof Thereof—Refusal of Defendant to Produce Notice—Copy of, Need Not be Retained.*

1. Facts are established in the trial of a case both by direct and circumstantial evidence, and it is therefore impossible for a magistrate to certify that a bill of exceptions contains all the evidence bearing upon a given subject, or to say what testimony was considered by the jury in arriving at their conclusion, and where this is attempted, and a bill of exceptions does not purport to contain all the evidence offered in a case, it can not be reviewed on the question of weight of evidence.
2. Moreover, in an action before a justice of the peace in a forcible entry and detainer case, it is the competency of evidence, and not its weight, that is open to review.
3. Where the record shows in such a case that a demand was made in open court upon the defendant to produce the notice to vacate the premises, and the demand was refused, oral testimony regarding the giving of the notice is competent, notwithstanding no notice was given to the defendant prior to the trial to produce the notice to vacate.
4. The defendant having this notice in his possession, his refusal to produce it would be some evidence that the contents of the notice, if produced, would be against his contention.
5. The requirement of the statute is met, if written notice is served on the defendant or at his place of abode at least three days before the bringing of the action; whether or not the plaintiff retains a copy of the notice is of no moment to the defendant.



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HULL, J.; PARKER, J., and HAYNES, J., concur.

This action is brought to reverse the judgment of the court of common pleas, which affirmed the judgment of a justice of the peace in a forcible entry and detainer case. The plaintiff in error was the defendant below, and the defendant in error brought her action before a justice of the peace to oust the plaintiff in error from a piece of land. She filed her complaint in due form, the case was tried to the justice and a jury, and a verdict returned against the defendant below, and judgment entered upon the verdict, to which judgment error was prosecuted to the court of common pleas, and there the judgment was affirmed, and it is sought here to have the judgments of the lower court reversed.

The question in the case is whether, under the bill of exceptions brought here, the court should find that the verdict in the justice's court and the judgment were against the weight of evidence, and not sustained by sufficient evidence.

The point made by counsel for plaintiff in error is, that the evidence is not sufficient to show that the statutory notice to leave the premises was served three days before the action in forcible entry and detainer was commenced.

It is claimed on the part of the defendant in error that there is no authority in law to bring this question in a forcible entry and detainer suit before this court on error; second, that the bill of exceptions in any event is incomplete, in that it does not set forth all the testimony, and that, therefore, the court can not consider this question; and third, that if the bill of exceptions is considered, there is sufficient evidence to sustain the verdict.

The bill of exceptions does not purport to set forth all of the evidence, but it shows that the husband of the plaintiff below was her duly authorized agent to serve the written notice on the defendant, and "that he served this notice on the defendant personally; that plaintiff in open court demanded of the defendant that he produce this written notice as served, which demand defendant refused; that he gave this testimony in connection with considerable other testimony bearing on other points in the case, but he gave no further testimony

on the question of written notice on the defendant to vacate said land."

The bill of exceptions proceeds thus:

"The plaintiff then gave no other or further testimony as to the written notice having been served on the defendant to vacate the said land before this action was commenced, and without identifying any original notice or a copy of the same as having been served on the defendant at least three days before the action was commenced, and without introducing any such notice, either original or copy, or offering to introduce any such notice in evidence to the court and jury, she rested her case.

"Whereupon, the defendant, by his counsel, Thomas N. Bierly, moved the court to dismiss this action for the reason that the court had no jurisdiction to further proceed in the same, on account of said failure of proof as to the notice to vacate—because the plaintiff had not introduced in evidence any written notice, original or copy, that had been served on the defendant, showing that he had three days' notice to vacate said land before this action was brought; because there was no evidence to show by what day the defendant was to vacate the said land."

The record discloses that there were several witnesses called before the justice of the peace, who gave their testimony, and the bill of exceptions shows that there was other testimony (how much, of course, does not appear) besides this, which the justice certifies was all of the testimony there was upon the question of notice.

The bill not setting forth all of the testimony, nor purporting to do it, the first question is, can it be considered? Can we consider the question whether the verdict was against the weight of the evidence, and the judgment of the justice erroneous on that account? We are of the opinion that we can not, under the law and authorities in this state. We think that a court of error can not review this question as to whether a verdict is against the weight of the evidence unless the bill of exceptions sets forth all of the testimony.

The magistrate has no power or jurisdiction to make a certificate that the testimony contained in the bill of exceptions is all of the testimony bearing upon this question of notice.

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The facts are established in the trial of a case both by direct and circumstantial evidence. There may have been admissions of the party, there may have been conduct on his part, established by the evidence, that tended to show that a proper notice to suit, under the statute, had been served upon him, and to which the jury gave weight and consideration in arriving at their verdict, and this evidence may not have appeared to the justice to bear upon this question. It is not for the court to say what testimony was considered by the jury in arriving at their conclusion, or what testimony bore upon any particular question, if the question as to the weight of the evidence is to be presented to a higher court for review. The court reviewing such a question must have before it all of the testimony that went to the jury; for, as was said by Judge Ranney in a decision of the Supreme Court, it is in the nature of an appeal from the findings of the jury, and to enable a court of review to determine whether the jury was right or not, it must have all of the testimony that was offered before the jury, and it would not do to hold that the certificate of the court or judge who presided at the trial that this was all the testimony bearing on this question was sufficient. The question has been decided by this court as formerly constituted—Judges Bentley, Haynes and Scribner—in which the opinion was delivered by Judge Bentley, and the authorities collected and discussed. The case is that of *Cincinnati, H. & D. Ry. Co. v. Curtis*, 17 C. C., 554. The second paragraph of the syllabus is:

“The rule in Ohio that a bill of exceptions must contain all the evidence in the case, in order to enable the circuit court to reverse a judgment as against the weight of the evidence, is so absolute that the judgment will not be disturbed if evidence is omitted, although the bill may certify that such evidence or ‘all other testimony offered in behalf of plaintiff relates solely to the character and extent of plaintiff’s injuries.’ ”

The opinion, on page 116, cites from the decision of Judge Ranney, in *Eastman v. Wight*, 4 Ohio St., 157:

“To enable this court to review the judgment of the court below, overruling a motion for a new trial, because the verdict is claimed to be against the evidence, it must appear, either

expressly or by necessary implication, that the bill of exceptions contains all the evidence given to the jury upon the trial. This has been the constant course of decision, and is affirmed in several reported cases. \* \* \*

"Indeed, the very nature of the inquiry demonstrates the absolute necessity of the rule. No question of law is involved, but it is simply an appeal from the jury on the facts; and without having the evidence given to the jury, it is impossible for us to say whether it justified their finding or not."

Judge Bentley, in delivering the opinion in the case above cited, says, on page 117:

"Now, the statement of this bill is: All other testimony offered in behalf of plaintiff related solely to the character and extent of plaintiff's injury. That was the opinion of the judge who signed the bill of exceptions and those who prepared the bill for his signature—the statement as to the character of the other testimony; but it indicates that there was other testimony which was not preserved, and from the authority of *Eastman v. Wight*, 4 Ohio St., 157, and *Railway Co. v. Probst*, 30 Ohio St., 104, where the judge had made a statement, it would seem to us, from that alone, that the proposition is strong and analogous to the present case, and decisive of it. Peradventure the reviewing court may have had the same opinion in regard to the balance of the testimony that the jury may have had. The jury may have thought that that testimony omitted by the bill, which the court say bore upon other points, in fact bore upon the principal question; and this court, if it were before us, might come to the same conclusion. We think that the rule under the authorities is so absolute, in Ohio, that we are not permitted in this state of the record to reverse the judgment for this reason, although it is of no moment what the court think of the strength of the plaintiff's case, if we had all the testimony before us."

It is claimed in argument by counsel that the question whether a notice to quit had been served upon defendant was rather addressed to the court than to the jury, as the question of service of summons would be; but we think otherwise. The statute, Section 6602, Revised Statutes, requires that the notice be served three days before the action is commenced by the party or some one acting for him, and before he can begin his action in forcible entry and detainer this notice must be served, and the

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three days must have elapsed. In order to establish his case and recover against the defendant, he must establish that the notice was served the proper time before the action was commenced. Upon that question evidence may be offered both for and against, and that question goes to the jury along with the other questions in the case. So that we think it is clear that this question was properly submitted to the jury.

We hold, however, that such a question as this can not be reviewed upon error in any event in a forcible entry and detainer case. This was so held by the Supreme Court of the state in *State v. Wood*, 22 Ohio St., 537. The syllabus is:

“Section 137 of the justices’ act (1 S. & C., 7941) authorizing the taking of exceptions to the opinion of the justice, upon ‘questions of law and evidence,’ in actions of forcible entry and detainer, does not extend to or include questions touching the weight or sufficiency of the evidence, but only such as relate to its competency.”

The statute, Section 6610, Revised Statutes, is the same upon this subject now as it was when that case was decided. And upon the authority of this case, we hold that error can not be predicated upon this action of the justice. Holding these views, it is not necessary for us to discuss the evidence as disclosed by the bill of exceptions. I will touch upon one point only.

It is urged that inasmuch as the record shows that the notice itself was not offered in evidence, but the testimony in regard to it was oral, it should be considered as though no testimony had been offered, for the reason, as it is claimed, that the oral testimony offered was incompetent. The record, however, discloses that a demand was made in open court upon the defendant to produce the notice, so that it might be offered in evidence, and the paper itself that plaintiff was seeking to prove being the notice, and the action being of such a character that the defendant below was notified thereby that the plaintiff would seek to prove this notice or to offer it in evidence, this demand to produce and the refusal made this testimony proper, although no notice had been served upon the defendant prior to the trial to produce the notice.

1 Greenleaf on Evidence, Sections 560 and 561, says:

“Section 560. When the instrument or writing is in the hands or power of the adverse party, there are, in general, except in the cases above mentioned, no means at law of compelling him to produce it; but the practice, in such cases, is to give him or his attorney a regular notice to produce the original; not that, on proof of such notice, he is compellable to give evidence against himself, but to lay a foundation for the introduction of secondary evidence of the contents of the document or writing by showing that the party has done all in his power to produce the original.

“Section 561. There are three cases in which such notice to produce is not necessary. First, where the instrument to be produced and that to be proved are duplicate originals; for, in such case, the original being in the hands of the other party, it is in his power to contradict the duplicate original by producing the other, if they vary; secondly, where the instrument to be proved is itself a notice, such as a notice to quit, or notice of the dishonor of a bill of exchange; and, thirdly, where, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with possession of the instrument as, for example, in trover for a bill of exchange.”

So that it seems to be the rule that it is not necessary to serve a notice to produce where the instrument is itself a notice, or where from the nature of the action the party has notice that the other party will offer testimony as to the instrument in question.

We hold, therefore, that the evidence does tend to show that a notice was served upon the defendant to leave the premises—“to vacate the land,” is the term used in the bill of exceptions; and that a demand was made upon the defendant in open court to produce that notice, which he refused to do. Having the notice in his possession, his refusal to produce it would be some evidence, at least, that the contents of the notice, if produced, would be against his contention, or in favor of the party calling for its production.

It is urged that under the statute notice should have been served by copy, and a duplicate copy retained by the plaintiff. The statute requires that the notice be served at least three days before the beginning of the action (Section 6602, Revised Statutes), and requires that the notice shall be served by leaving a written copy with the defendant or at his place of abode.

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We do not think that this requires that two copies of the notice be made, but what the statute means is, that a notice in writing be served upon the defendant. It is of no moment to the defendant whether the plaintiff retains a copy of the written notice served upon him. When the plaintiff tries his case, it is necessary for him to show that the notice was served. If we were to consider this bill of exceptions upon the question of the weight of the evidence, we should hold that the evidence was sufficient to establish the fact that a notice was served upon the defendant to leave these premises. He being in open court, with a notice in his possession that was served upon him, and refusing to produce it, together with the other evidence that the record discloses, we are of the opinion that the jury were justified in returning a verdict in favor of the plaintiff.

For the reasons then, first, that there is no bill of exceptions here that the court can consider upon the question of the weight of the evidence; second, that under the law this question can not be raised in a court of error on a bill of exceptions; and third, that if we were to consider the bill of exceptions as it is here, we would find against the plaintiff in error, the judgments of the court of common pleas and of the justice of the peace are affirmed.

*T. N. Bierly*, for plaintiff in error.

*L. T. Williams* and *F. E. Calkins*, for defendant in error.

**DAMAGES TO PROPERTY FROM THE BREAKING OF A  
WATER MAIN.**

[Circuit Court of Hamilton County.]

GUSTAV R. WERNER v. THE CITY OF CINCINNATI. \*

Decided, April 16, 1902.

*Damages—From the Bursting of a Water Main, Flooding Residence Property—Proximate Cause not Faulty Construction of House—Erroneous Charge of Court as to Contributory Negligence—Pleading as to Former Recovery—Defense of Res Judicata.*

1. A property owner in constructing a building or maintaining service pipes is not bound to anticipate the contingency of the bursting of a water pipe in the street, and in an action against the municipality for damages on account of a rush of water over his premises from such a break, it is erroneous to charge that he can not recover if his own acts or omissions contributed in any degree to the injury, where no issue has been made either in the pleadings or evidence as to contributory negligence.
2. A former recovery relied upon as an estoppel should be pleaded; but if not pleaded, the judgment is still admissible in evidence, though it is not a conclusive bar to the action.
3. Whether actually determined or not, every question which might have been litigated in a former suit will be deemed to be at rest.
4. Other errors are immaterial, if a defense of *res judicata* is sustained by the evidence.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

Heard on error.

The plaintiff below alleges in his petition that the city negligently suffered its water mains to leak, and causes the water to flow over his premises, whereby his dwelling house was damaged in the sum of \$2,000.

The amended answer contains a general denial, and also an allegation that if any injury has happened to said property it has resulted from the neglect and improper construction of said house and the maintenance thereof, and to the negligent maintenance of service pipes unrepaired.

The reply contains a denial of new matter in the answer.

A verdict was returned for the city and judgment rendered thereon. Plaintiff prosecutes error, and as a ground thereof

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\* Affirmed by the Supreme Court without report, April 5, 1904.



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says the court erred in giving to the jury, at the request of the city, the following special charge, to-wit:

"If you find that the acts or omissions of the plaintiff, as you may find from the evidence, contributed in any degree to the injury of which he complains, your verdict must be for the defendant."

This instruction and the facts of the case are similar to those in *Johnson v. Cincinnati*, 20 C. C., 657, in which case this court held the special charge to be erroneous upon authority of *Schweinfurth v. Railway Co.*, 60 Ohio St., 215. The charge before us comes within the same authority, and for like reasons must be held erroneous.

It may be said in addition that the pleadings do not present a case of contributory negligence, and hence there was no occasion for a charge upon that subject. The proximate cause of the injury was as alleged in the petition, the breaking of the water main, and if the damages were only enhanced by reason of the defective construction of the house or the negligent maintenance of the service pipes, neither of them was a cause without which no damages would follow, and if either or both of them cause all the damage, independent of the break in the main, then there was a failure of proof of the negligence alleged. If A negligently breaks a window in B's house, B has a cause of action against A for damages, and it is no defense if the glass was thin and weak, and that had it been of double strength it would not have been broken. So that in this case the plaintiff owed no duty to the city in constructing his house, or maintaining his service pipes, to anticipate and provide against a rush of water caused by the negligence of the city.

This error, however, is immaterial if the defense of *res judicata* is sustained by the evidence. Such defense was not pleaded, but a petition filed by this plaintiff and the judgment thereon were offered in evidence, from which it is claimed by the city that the matters litigated in this suit were determined in the other case. While a former recovery relied on as an estoppel should be pleaded, still if not so pleaded the judgment is admissible evidence, but it is not a conclusive bar to the action; the jury may nevertheless find for the plaintiff if they think

him entitled to recover. *Meiss v. Gill*, 44 Ohio St., 253.

In that case, which was commenced after the present suit, the petition contains the allegation that by reason of the careless and negligent manner in which the retaining wall in front of his premises was constructed, the same has become cracked, and that in consequence thereof the water and sewerage seeps through the said wall from said street and into the foundation of his house, undermining the same and damaging the house in the sum of \$500. In each case the petition contains the averment that the damage to the house was caused by the water flowing from the street, in the one case from a broken main, and in the other, presumably from the surface of the street, and the time within which the damage was done in the present suit is included in the period covered by the suit first determined. Although the averments in the two petitions are not precisely alike, the same damages arising from substantially the same cause are set out in each.

It is immaterial whether the negligence of the city consisted in suffering the water main to be and remain out of repair, or whether any negligence was alleged or shown in the other suit, provided the same flow of water and resulting damage that are now alleged were embraced in the former adjudication, and we think they are identical.

It is urged by counsel for plaintiff in error that the former judgment is for damages arising only from a change of grade of Baltimore avenue, but it will be observed that this part of the judgment is by consent, and made to include damages thereafter accruing, while the judgment proper covers all the issues in the case; and besides it is well settled that every question which the parties might have litigated in a case is deemed at rest, whether actually determined or not. *Petersine v. Thomas*, 28 Ohio St., 596.

It is apparent from the record that the jury found for the defendant below, for the reason that the former judgment was a bar to this action, and having affirmed this finding, we think it unnecessary to consider the errors assigned.

Judgment affirmed.

*Gustav R. Werner*, for plaintiff in error.

*Corporation Counsel*, contra.

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**REQUIREMENTS BY BUILDING ASSOCIATIONS AS TO  
INSURANCE.**

[Circuit Court of Lawrence County.]

JOHN GESWINE, JR., v. STAR BUILDING &amp; LOAN CO.

Decided, 1902.

*Building Associations—By-Law Requiring that Insurance Policies shall be Kept on Deposit with the Company—Covering All Property on which Mortgages are Held—Policy Expires and Property Burns—Company Liable for the Loss—Agency.*

The by-laws of the defendant building association provided that all property upon which mortgages were held should be kept insured and the policy deposited with the association, and in the event of the failure of a borrowing member to procure insurance or secure a renewal, this was to be done by the association at his expense. Upon obtaining a loan from the association, G procured insurance and deposited the policy as required by its by-law. He had no notice of the expiration of the policy, and the association failed to secure a renewal, and the property having thereafter been partially destroyed by fire, he sued the association for the loss thus sustained. *Held:* That this provision of the by-laws made the association as to the matter of insurance the agent of the mortgagor, charged with the duty of holding the policy and renewing it if a renewal became necessary, at the mortgagor's expense, and having failed so to do, the association became liable to the mortgagor for the loss sustained.

CHERRINGTON, J.; SIBLEY, J., and JONES, J., concur.

John Geswine against The Star Building & Loan Company of Ironton, Ohio, a corporation, is a petition in error to reverse the judgment of the common pleas court in sustaining a demurrer to the petition as amended.

The petition, after stating that the defendant is a corporation existing under the laws of Ohio, states that the defendant adopted a constitution and by-laws, and copies a number of the articles of the same, some of which I will read.

Article 5 provides that any person upon subscribing for, or in any way becoming the owner of one or more shares of the capital stock of this association, shall become a member thereof, and as such shall be entitled to all the benefits and privileges,

and subject to all the liabilities and duties of membership as prescribed by the constitution and by-laws.

That on or about January 7, 1896, this plaintiff subscribed for and became the owner of five shares of the capital stock of said defendant, and ever since has been and is now the owner thereof.

Article 3 provides that the association is organized for the purpose of raising money to be loaned among the members thereof, for use in buying lots and houses, in building and repairing houses, and for such other purposes as are authorized by law.

Section 4 of the by-laws provides, among other things, that the treasurer of said defendant shall be the custodian of all the funds, notes, mortgages, fire insurance policies, and other papers belonging to the association, and that his books shall be open to any member of the board of directors at any time.

While all of these that I have read are important, Section 32 of the by-laws is the most important one of all; it provides that—

“When the board of directors see fit they may require any member taking a loan to cause the mortgaged property to be insured for the benefit of the association against loss by fire, in some company to be approved by them, in a sum which they shall name and to keep the same insurance during the continuance of the loan. The policy of insurance, properly indorsed by the company insuring the same, shall be deposited with the association, and all renewals on policies so deposited shall be made by the association and the cost thereof deducted from the amount paid from the borrower. Upon the failure of any member to insure said property as required, or upon the cancellation of any policies deposited as aforesaid, the board shall insure the same at the expense of such member and deduct the cost thereof from the amount paid in by him.”

Section 27 provides, among other things, that all loans must be secured by first mortgages on real estate in Lawrence county, Ohio, or on the stock of the association, or on government bonds or other equally good collateral, that he owns.

That on or about August 31, 1896, this plaintiff borrowed of said defendant on three shares of its capital stock owned by

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him, the sum of \$300, and in order to secure the payment thereof to the said defendant, according to the provisions of its said by-laws, executed and delivered to said defendant his certain mortgage upon certain lots of real estate described, of which he was and still is the owner; that a two-story frame dwelling house stood upon the real estate on said date and continued to stand there, in good condition, until about September 11, 1900. That one of the conditions of said mortgage required the plaintiff to keep insurance on the property described therein, as the board of directors of the defendant required; said mortgage has never been paid off or canceled, and is still in full force and effect.

The amendment is as follows:

“That on or about August 16, 1897, the plaintiff caused said dwelling house to be insured for a period of three years from said date in the Teutonia Insurance Company of Dayton, Ohio, in the sum of \$500 for the benefit of the plaintiff, loss, if any, payable to the defendant as its interest in said premises might appear as mortgagee. That at the expiration of the date of said policy of insurance as hereinafter set out, the indebtedness of this plaintiff to said defendant did not exceed the sum of one hundred dollars; that said board of directors required this plaintiff to deposit said policy of insurance properly indorsed by the company insuring the same, with said defendant, The Star Building & Loan Company, of Ironton, Ohio, and to keep the same insurance during the continuance of the loan.”

That the said policy of insurance properly indorsed by the company insuring the same, and that in pursuance of the provisions of Article 32 was by this plaintiff immediately deposited with the treasurer of the defendant and approved by him, and said association received said policy without objection and took the same into its custody, and still has possession and control thereof; that upon the deposit of said policy by this plaintiff with said treasurer, as aforesaid, this plaintiff paid no further attention to the insurance on said dwelling house and thought nothing more about the same, but relied upon the defendant to renew the said policy as by said Section 32 required, and as it was bound to do, and this plaintiff had entirely forgotten the date of its expiration and had no means of knowing the date of

the expiration of said policy; neither did the defendant nor any other party notify him of said expiration, nor did the plaintiff have any knowledge of the expiration thereof; and he says on August 16, 1900, the said policy of insurance expired, and that defendant failed and neglected to renew the same or to insure said dwelling house in any other company; that this plaintiff had no other policy of insurance upon said dwelling, and on September 11, 1900, said dwelling house was partially destroyed and damaged by fire to the amount of \$400, and he asks that he recover judgment for the said \$400 with interest.

The court sustained the demurrer to that petition as amended, and the sole question for determination in this court is as to the validity of this petition as amended. Do the averments state a cause of action? The theory of counsel for the defendant is that the scheme of the defendant, as indicated by its by-laws, was that this insurance should be for the benefit of the association alone, and for its own convenience. It is provided by by-law 32 that it shall be deposited with the treasurer, and that he shall make renewals and attend to all these matters and charge the same up to the mortgagor, and that that clause 32 being solely for the benefit of the defendant, he can comply with it or waive it as he sees proper, and if he waive the benefits intended to be covered by that clause of the by-laws, and decline to take out a policy at the expiration of the original policy, that is an end of the matter so far as that policy was concerned, and it would involve no liability.

We have been cited to no authorities in this matter; counsel has stated that they have searched for them and are unable to find anything bearing upon this point, and it must be decided upon elementary principles; and some of the members of the court, possibly the majority of us, thought at the conclusion of the argument—we were rather inclined to adopt the views urged by the defendant, but on further examination, we have come to the conclusion, while there may be some doubt about the matter—that that is not the proper view to take of this case. It is true that the scheme on the part of the defendant was, in addition to this security by mortgage on the stockholder's real estate, to have an additional security for itself

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in the shape of insurance; while it is true that was the case, yet we think also, that it is pretty plain from the reading of these by-laws, that this insurance was for the mutual benefit of the company and this stockholder.

There is only one paragraph in this section 32 that militates against that view, and that is, for its convenience, of course, "that all renewals on policies so deposited shall be made by the association and the cost thereof deducted from the amount paid from the borrower." Now let me transpose the language a little bit right here. "And upon the failure of any member to insure said property as required or upon the cancellation of any policies deposited as aforesaid, the board shall insure the same and deduct the cost thereof from the amount paid in by him."

The only feature in these by-laws that militates against the view that is for the mutual benefit of both parties is this: "Upon the failure of any member to renew the same, the renewal shall be made by the association and the cost deducted from the amount paid in by him;" but, whatever may be the intention as to that paragraph, the effect of it is the same. The effect of it is mutual insurance. The company had already been secured by mortgage. The stockholder had borrowed only \$300, and he had taken out insurance for \$500. It is very apparent that the effect of the whole thing was for the mutual benefit of both parties.

We think that can be settled on the doctrine of agency; that these by-laws made the association the agent for the mortgagor and the one insuring and they agreed these by-laws, that is the effect of them, they agreed to take charge of this policy and renew it if it became necessary and charge it up to the plaintiff, and failing to do that, why are they not liable for the failure to comply with their contract?

I say there have been no authorities cited; we don't attach much value to this brief opinion in 65 Illinois, 453-62, yet it tends in the direction that I have named. Now, it is not authority of any value because there is an entire absence in the statement of the case of any by-laws governing the association which show or determine the respective duties of the parties,

but there the plaintiff had procured a loan of \$700 from the Chicago Building Association, giving his note and deed of trust on the real estate for security, and he covenanted in that deed to keep the building insured in such company as the building association should designate. Crowell procured a policy for \$1,000 and deposited the policy with the company; the secretary paid the premium of five dollars and charged it up to Crowell on his pass-book; a short time before it expired he went to the secretary, said he would take out the policy himself, and the secretary replied that the association preferred to do it; thereupon Crowell left the matter with the secretary, and the secretary neglected and failed to renew the policy, and the building burned down and suit was brought. The only defense made in the case is, that this secretary had no authority to make the representations, or the agreement with Crowell that he did make, but the court holds that this secretary had the right to make these representations, and we take it, although it does not so state, that the company, having induced Crowell to permit this company to insure, is estopped from saying that it was not their duty to do so, and holds the company liable, and, of course, it must have been on the theory that the company was the agent of Crowell, the plaintiff in the case.

As before stated, we think these by-laws constituted this defendant the agent for the plaintiff, to renew this policy, and having failed to do it, it shows dereliction of duty, and the company is liable therefor.

The judgment will be reversed and the cause remanded with instructions to the court below to overrule the demurrer.

*Corn & Thompson*, for plaintiff in error.

*Miller & Miller*, for defendant in error.



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**STREET RAILWAY FARES ON LEASED AND PURCHASED LINES.**

[Circuit Court of Lucas County.]

STATE, EX REL SHEETS, ATTORNEY-GENERAL, v. TOLEDO RAILWAY &amp; LIGHT CO.

Decided, June 20, 1902.

*Street Railways—Franchises of—Conditions Imposed as to Rates of Fare—Violated on Purchased and Leased Lines—Quo Warranto by the State the Proper Proceeding Against Offending Company—Allegations Sufficient Against Demurrer—Action ex contractu by City—Sections 2501, 2502 and 2505a.*

1. An ordinance prescribing terms and conditions upon which a street railway franchise may be used has the force and effect of an act of the Legislature, and to prevent violation of the terms of such franchise an action may be brought *ex contractu* by the municipality or in *quo warranto* by the state.
2. Where a company has acquired lines by lease or purchase, under the authority of 2505a, and is collecting fares for one continuous ride in the same general direction over its said lines so purchased within the corporate limits in excess of the maximim rate of fare to be charged over any one of the separate lines, *quo warranto* by the state is the proper proceeding to prevent further offending in that regard.
3. An allegation setting forth such offending in general form is good against demurrer.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This is an action in *quo warranto*. The relator states in his petition:

“That the defendant, The Toledo Railway & Light Company, is a corporation duly organized under the general corporation laws of the state of Ohio for the incorporation of street railways, and has been such since July 1, 1901, in the city of Toledo, county of Lucas and state of Ohio; that said defendant became and is so incorporated as aforesaid for the purpose of constructing, maintaining, operating, extending, purchasing, acquiring, leasing and owning street railroads and railroads operated as street railroads, to be operated by electric power, together with all the property and all the franchises, rights and privileges, respecting the use and operation of the same, and

for all purposes incidental thereto, in said city of Toledo, Lucas county, Ohio:

"That prior to August 10, 1901, the Toledo Traction Company was the owner of, and was operating and maintaining all the lines of street railway existing within said city of Toledo, and owned, enjoyed and operated all the rights, privileges, franchises, property and street railway lines theretofore owned, operated and enjoyed by the following persons and corporations, to-wit: the Central Street Railway Company; The Metropolitan Street Railway Company; David Robison, Jr., Trustee; The Toledo Electric Street Railway Company; The Toledo Traction Company.

"That said several persons and corporations above named operated and maintained their respective lines of street railways upon and over the streets, alleys, ways, lands and highways of the city of Toledo, and enjoyed the rights, privileges and franchises thereto annexed, by virtue of separate grants and franchises made by said city of Toledo to each of said persons and corporations, upon the condition, among others therein expressed, that the grantee of the privilege and franchise, the successors or assigns of such grantee, should not charge a higher rate of fare than five cents for each adult passenger for one continuous route or ride in the same general direction over all the lines therein authorized to be constructed and operated; that said several persons and corporations above named accepted their respective grants conditioned as above set forth and enjoyed the rights, privileges and franchises therein granted, and constructed, operated and maintained lines of street railways upon and over the streets, alleys, ways, lands and highways of the city of Toledo thereunder; that each and every of said grants of franchises, rights and privileges so made by the city of Toledo to said several persons and corporations above named, was for a period of twenty-five years, and all of said grants so made are at this date unexpired and each and all of said grants have a long period of time, to-wit, more than seven years yet to run.

"That said The Toledo Traction Company constructed, operated and maintained its said lines of street railway upon and over the streets and public ways of the city of Toledo, by virtue and under the condition of the said several grants so made by the city of Toledo to the several persons and corporations above named, as the successor or assign of said persons and corporations.

"That on August 10, 1901, said defendant, The Toledo Railway & Light Company, acquired by purchase from said The

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Toledo Traction Company all the lines of street railway existing within the corporate limits of said city of Toledo, together with all the rights, privileges and franchises thereto belonging and connected therewith, and said defendant has ever since said August 10, 1901, been, and now is, the owner of, and has since said date been and is now operating and maintaining all said lines of street railway; that said The Toledo Railway & Light Company is maintaining, controlling and operating all of said lines of street railway in the city of Toledo as the successor and assign of said The Toledo Traction Company, and under and by virtue of and subject to the conditions of the grants made by the city of Toledo as aforesaid, to said several persons and corporations hereinbefore named, and has no other right or franchise to construct, operate or maintain lines of street railway upon the streets, alleys, highways and public places in the said city of Toledo.

"That said defendant, The Toledo Railway & Light Company, as such corporation aforesaid, has ever since August 10, 1901, continuously within this state, to-wit, at the city of Toledo, in the county of Lucas, offended against the laws of this state and the provisions of an act for its creation and grossly misused its corporate authority and the franchises and privileges conferred upon it by law and especially in the following particulars, to-wit:

"First. That it has refused and does refuse to carry and transport passengers over its said lines of street railways at the rates of fare established by the contract of its predecessors in rights and interests, and fixed by the grants of rights, privileges and franchises from the city of Toledo, under which it operates said lines of street railways upon and over the streets, alleys and public highways of said city of Toledo.

"Second. That it has established and demands and receives, and requires the public to pay, a higher rate of fare for one continuous route or ride in the same general direction over all its said lines of street railway, so purchased as aforesaid, within the corporate limits of the said city of Toledo, than the maximum fare charged over any one of the several separate lines of street railway, so purchased prior to such purchase aforesaid.

"Third. That it has established, charged, demanded and collected a rate of ten cents for one continuous route or ride in the same general direction over its lines of street railways, within the corporate limits of the city of Toledo, so purchased and operated as aforesaid, and that the highest rate of fare charged for one continuous route or ride in the same general direction, within the corporate limits of the city of Toledo, over

any one of said several lines of street railways so purchased as aforesaid by the defendant, The Toledo Railway & Light Company, prior to said August 10, 1901, has been five cents.

"Wherefore the relator prays the advice and judgment of the court in the premises and due process of law against said The Toledo Railway & Light Company, and that it be adjudged to have forfeited its franchises and be ousted therefrom or from the franchises so abused by it."

The complaint made against the defendant here, in substance, is: That it acquired these lines by purchase in pursuance of the authority of the statute which imposes as one of the conditions of purchase that it should not charge over any of the lines running in the same general direction a greater rate of fare than was charged as the maximum charge over any one of the constituent lines before such purchase and sale. And it is said that defendant is violating this condition, and, in that respect, is unlawfully exercising the franchise.

The defendant demurs to the petition on the grounds:

"1. That said Circuit Court of Lucas County, Ohio, has no jurisdiction of the subject of the action.

"2. That the plaintiff has not legal capacity to sue in this action.

"3. That the petition does not state facts sufficient to constitute a cause of action in *quo warranto*."

The second ground of demurrer is not urged or relied upon, and we have not been able to discover any reason for challenging the capacity of the plaintiff to sue or of the relator to represent the plaintiff.

The first ground of the demurrer is based upon the claim and contention of the defendant that the subject-matter of the suit is founded on contract and not on franchise, and that if the defendant is guilty of any wrong, the petition discloses that such wrong consists of the violation by the company of the contract between the company and the city, though the company does not concede that there is any contract existing that forbids its charging fares as alleged in the petition. Perhaps, more accurately stated, the contention is that the subject-matter might appropriately be regulated by contract, but that it is not and can not be an element of franchise, and if regulated

by contract, the remedy must be by an action *ex contractu*, and can not in any event be by an action in *quo warranto*.

By the company it is conceded that the privilege of constructing and maintaining tracks, poles, wires, etc., in the streets of the city, and operate cars upon the same, is a franchise emanating from the state, but it contends that the charge for the service is an exercise of a natural right, which does not emanate from the state as a privilege or franchise, although it may be regulated by contract with the municipality where the railways are operated.

Sections 2501 and 2502, Revised Statutes, provide for the granting by municipalities of permission to persons or corporations to construct and operate street railways upon "terms and conditions" to be prescribed by the council by ordinance, and that such grant shall not be made "except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rate of fare," etc.

We understand that it is contended by the relator that the terms and conditions thus imposed are conditions imposed upon the exercise of the franchise; that though the franchise emanates from the state, it is not to be enjoyed except by permission of the municipality and upon terms and conditions prescribed by the municipality. That this authority to prescribe terms and conditions also emanating from the state and to be exercised by an agency of the state for the public benefit, amounts to an authority to mould or modify the franchise, and that the conditions upon which the franchise is to be enjoyed are limitations upon and integral parts of the franchise, so that the exercise of the franchise in violation of such conditions may be said to amount to an unlawful exercise of a franchise and to authorize *quo warranto* proceedings as provided by Section 6760, Revised Statutes, and the sections following.

We do not find that we are called upon to decide upon this contention in passing upon this demurrer, but the question is likely to be directly presented later on in the case, and therefore we take occasion to remark that we do not regard the fact that these conditions are matters of contract, or arising out of contract between the railway company and the municipality, as a

fact decisive of the question, or at all significant, for franchises in general are founded upon contract between the state or authority granting the same and the companies to which the same are granted.

As to the character of the franchise, it is said in *California v. Railroad Co.*, 127 U. S., 1, 40, by Mr. Justice Bradley:

“Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest, and for the public security.”

As a matter of convenience, I read from Anderson's Dictionary of Law, at page 474, a short paragraph, which cites *Chincleclamouche Lumber Co. v. Commonwealth*, 100 Pa. St., 438, 444; and *The Binghamton Bridge*, 70 U. S., 51.

“A grant of a corporate franchise by an act of legislation, accepted by the grantee, is a contract between the state and the grantee, the obligation of which a subsequent Legislature can not impair.”

In *State v. Railway Co.*, 40 N. W. Rep., 487, the syllabus reads:

“Under Section 1862, Revised Statutes, a municipal ordinance granting to a street railway corporation a franchise to occupy and use public streets for the purposes of its railway, has the force and effect of a statute of the state; and for a violation of the provisions of such ordinance an action may be maintained under Section 3241, Revised Statutes, to vacate the charter or annul the existence of such corporation.”

The case contains an interesting discussion which I will not pursue by reading. So far as we can discover, the statutes of the state of Wisconsin upon this subject are not materially different in respect to the extent of authority conferred and the character of a franchise granted, from the statutes of the state of Ohio upon the same subject.

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Further on the subject of franchises I refer to 2 Spelling Injunctions and Other Extra. Rem., Section 1807:

“Where the statute by legal exercise of a right which, at common law, was private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern—that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function.”

We are cited by counsel for the defendant to *People v. Gas Light Co.*, 38 Mich., 154. The decision of Campbell, chief justice, and the bench was made up of very able judges, among whom was Thomas M. Cooley, and we have to say with respect to that decision simply this: That we are unable to reconcile it with what we understand to be the law and the theory of the law of the state of Ohio upon this subject. It seems to us that if a case of that character should arise in this state, it must be held that the privileges conferred there were in the nature of franchises, and that the conditions imposed were in the nature of conditions to the exercise of such franchises; but, however that may be, we do not understand the case to be in point upon the precise question presented by this demurrer, for the reason that we understand the question arises here upon the granting of a franchise by a state, by an act of legislation which itself imposed the conditions upon which the franchise is to be exercised, and does not involve the question of the effect of conditions imposed by a contract in the form of an ordinance entered into between the company and the municipality. The fact that the city, or individuals, may have a remedy by actions *ex contractu* or otherwise and can not proceed by *quo warranto*, affords, we think, no valid objection or obstacle to the state availing itself of this extraordinary remedy for the advantage of the general public, or for the enforcement of the rights of the general public, for it must be remembered that the use of the streets of the city and the occupation thereof by the tracks, cars and business of transportation companies are subjects in which the whole public, not merely residents of the

municipality, are interested and have rights, and in imposing these conditions to the exercise of these franchises, we think the city acts as the agent of the state and for the whole public, not merely for the city in its corporate capacity or for the residents of the city, and that the state may interfere when these conditions in which the public are interested are not complied with. And we believe that *quo warranto* is a proper form of proceeding to reach the end aimed at.

In *State v. Traction Co.*, 18 C. C., 490, which was a suit in *quo warranto*, to interfere with and prevent a street railroad from carrying freights through the city of Dayton, on the ground that it was exercising a franchise not conferred upon it by law, it was held that it was exercising a right upon which the municipality had no right to place a limitation, and that an ordinance which undertook to prevent it from carrying freight was invalid for that reason. But, with respect to the remedy pursued, if it had turned out that the contention of the relator was correct as to the right involved, we understand that proceeding by *quo warranto* was approved of. I read from page 217 a part of the opinion by Summers, J.:

"This brings us to the question of the validity of the provision of the ordinance prohibiting the carrying of freight. It is contended, however, that an ordinance granting permission to construct a street railway is a contract (*Cincinnati Street Ry. Co. v. Smith*, 29 Ohio St., 291, 306; *Cincinnati & S. Ry. Co. v. Carthage*, 36 Ohio St., 631; *Columbus v. Street Railroad Co.*, 45 Ohio St., 98); that *quo warranto* is not the remedy for enforcing a contract (*State v. Railroad Co.*, 50 Ohio St., 239); and further, that a special remedy is provided by Section 1777, Revised Statutes, which makes it the duty of the city solicitor, whenever an obligation or contract made on behalf of the corporation granting a right or easement is being evaded or violated, to apply for the forfeiture or the specific performance of the same.

"It is true that such an ordinance is in some respects a contract, and so is a franchise. And in some states it is held that the right acquired by ordinance to construct a street railway is merely a license or easement, and that *quo warranto* is not the proper remedy to enforce the ordinance."

Citing many cases, and among them *People v. Gas Light Co.*, 38 Mich., 154.



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He then proceeds to say:

“But the better considered cases hold that the permission given by ordinance to construct a street railway in the street is a franchise granted by the state through the agency of the municipality, and that a violation of the same may be inquired into in *quo warranto*.”

Citing cases from Wisconsin, Alabama, and *State v. Street Ry. Co.*, 41 S. W. Rep., 955.

And when this case came to the Supreme Court we find from the report in *State v. Traction Co.*, 64 Ohio St., 272, that this course of proceeding to inquire into the question whether or not the company was unlawfully exercising its franchises, seems to have received the approval of the court.

I can not see that *State v. Dairy Co.*, 62 Ohio St., 350, which has been cited by counsel and discussed somewhat, throws any direct light upon this precise question involved here.

This complaint is based upon a clause in Section 2505a, Revised Statutes, that being the form in which the act was passed on April 23, 1898 (93 O. L., 214). This statute confers upon companies of this kind power to lease or purchase property of a railroad company, and to acquire its franchises. It points out the course of proceeding in order to accomplish this result, and contains this provision in the last clause:

“Provided, that whenever any such lease or purchase is made as herein provided, there shall be no increase of the existing rates of fare by reason of such lease or purchase, nor shall any fare be charged upon any of the separate routes so leased or purchased in excess of the fare charged over such separate routes prior to the lease or purchase thereof, and provided that when any such lease or purchase is made as herein provided, the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation shall not exceed the maximum fare charged over any one of said lines prior to such lease or purchase.”

It is distinctly averred in the petition that this purchase of these different lines by the defendant was made under authority of this statute, and it is distinctly averred that the company is offending against this statute, in that it is charging more for a

continuous ride in the same general direction over such line or purchased lines within the corporation than the maximum fare charged over one of said lines prior to such lease or purchase. These averments in the petition are very general in form, but we think they are sufficient to withstand a demurrer; whether they would be sufficient as against a motion to make them definite and be sufficient as against a motion to make them definite and certain, we are not called upon to say. A corporation can not dispose of its franchises; a corporation can not acquire the franchises and property of another corporation, except under authority of legislation authorizing it (*Branch v. Jesup*, 106 U. S., 468, 484, 488). And we are of the opinion that the company having exercised this authority under and by virtue of the statute, since it could not otherwise acquire the property, avails itself of power conferred upon it by the statute subject to the conditions imposed by the statute, and that the attorney-general may by *quo warranto* require it to observe such conditions. Whether these lines and routes with respect to which it is said the company is offending, do run in the same general direction so that it may be required to reduce its fares, is a question we have not yet reached. The petition does not enlighten us except by general terms; further pleadings in the case may present the question. Whether the company may avail itself of this authority without being obliged to observe the conditions on the ground that it had existing rights conferred upon it by previous legislation, or by existing contracts between it and the municipality, is another question, only hinted at and not discussed and not now present in the case, but a question which we imagine is looming up to bother us on after occasions. There is nothing in the pleadings as they stand to indicate that there is any such vested right being interfered with by the conditions imposed.

Something has been said in the course of the discussion about the extent of the relief that may be granted. It is sufficient to say that the court has power to mould the remedy to meet the exigencies of the case. The court will not be called upon to go farther than would be necessary to require the company to desist from exercising its franchises in charging and collecting

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fares in so far as they may be in excess of the rates fixed by the statute; but that is a matter not presented by the demurrer and may be for further consideration. We hold that the petition is good as against a demurrer, and the demurrer is overruled.

*John M. Sheets, M. R. Brailey and John P. Manton*, for plaintiff.

*Smith & Baker*, for defendant.

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### REGULATION OF THE SALE OF MILK.

[Circuit Court of Lucas County.]

HARLEY WALTON V. CITY OF TOLEDO.\*

Decided, July 1, 1902.

*Ordinance—Authorizing Inspection of Milk Valid—As a Health Measure—Permit to Sell Not a License—Exemption of Vendors of their Own Products Not Applicable—Broad Powers to Boards of Health—Ordinance not Burdensome.*

1. An ordinance regulating the sale of milk and cream, and providing for an examination of the places where produced and the product sold, and for the issuing of a permit to sell by the board of health, is not burdensome to the producer or inimical to the Constitution.
2. Such a permit, for which a fee of one dollar is charged, is not a license, and therefore not in violation of Section 2669, which exempts vendors of their own products from payment for a license.
3. Moreover, the exemption found in Section 2669 is subject to the exception that it shall not be construed to limit the powers of the board of health, and a fee of one dollar may be collected from persons selling milk regardless of whether it be denominated a license.

HAYNES, J.; PARKER, J., and HULL, J., concur.

Heard on error.

The petitions in error were filed to reverse the actions of the court of common pleas affirming the action of the police court upon certain prosecutions had under the ordinances of the city

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\*Affirmed by the Supreme Court without report, October 27, 1903.

of Toledo in regard to the selling of milk from wagons in the city of Toledo, and the questions argued go to the right of the city of Toledo to regulate the milk traffic in the city.

The statutes bearing on the question, and which have been discussed, I will cite first.

I refer to Section 1692, Revised Statutes, the municipal code, which reads as follows:

“In addition to the powers specifically granted in this title, and subject to the exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same.”

Paragraph 24 of this section provides:

“To establish a board of health and invest it with such powers and impose upon it such duties as may be necessary to secure the inhabitants from the evils of contagious, malignant and infectious diseases.”

However, as I have once before remarked, the attitude of this city toward special legislation is generally manifest, as it is in this case.

Section 2141, Revised Statutes, provides that:

“In cities of the third grade of the first class and in cities of the first grade of the second class, there shall be no board of health, but the board of police commissioners in such cities shall exercise all the powers and perform all the duties of the boards of health and mayors as provided in this chapter.”

Section 2669, Revised Statutes:

“The council of any city or village may provide by ordinance for licensing all exhibitors of shows or performances of any kind, not prohibited by law, hawkers, peddlers, auctioneers of horses and other animals on the highways or public grounds of the corporation, venders of gunpowder and other explosives, taverns and houses of public entertainment, and hucksters in the public streets or markets, and, in granting such license, may exact and receive such sum of money as it may think reasonable; but nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any product of his own raising, or the manufacturer of any article

manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product; provided, that in cities and villages, the council may confer upon, vest in and delegate to the mayor of such city or village, the authority to grant and issue licenses and revoke the same. Provided further, that nothing herein contained shall be construed to limit the power conferred upon cities and villages in section *one thousand six hundred and ninety-two* of said Revised Statutes."

In 1893 we find a law in the local laws of the Legislature of that year, 90 O. L. L., 335, which is another law for the city of Toledo:

"Section 2672-113. Any city of the third grade of the first class may provide by ordinance for licensing persons, firms and corporations engaged in such city in any occupation, trade, business or profession, as hereinafter named, and the owners of horses, mules, and vehicles of every kind used in such city, as hereinafter limited."

And Section 2672-114, provides:

"That such ordinance or ordinances may provide and require that the occupations, trades, business and professions as enumerated in this section, shall not be engaged in nor practiced in such city until in each case, as may be and as provided for therein, license therefor has been obtained in accordance therewith, viz: " \* \* \*

And then follows a long list of occupations which it is unnecessary to repeat, among them being:

"Selling, peddling or hawking any wares, goods, merchandise or produce from vehicles, hand or push carts, baskets, or by hand, in the streets or alleys, provided that any person selling the products of his own raising or goods of his own manufacture shall not be made liable for any license for selling, hawking or peddling the same in any manner on the streets or alleys of such city."

And in Section 2672-115 it is provided:

"That such ordinance or ordinances, providing for licensing owners of and for horses, mules, and vehicles used in such city, shall not require licenses for or on account of horses or mules less than three years of age; nor shall farmers, gardeners, fruit growers or florists be made liable for any license whatever for horses, mules, vehicles or otherwise, for marketing, selling, hawk-

ing or peddling the products of their farms, gardens or green houses or for hauling any produce, goods or merchandise into or out of such city; nor shall such horse, mule or vehicle license be required of persons living without such city and engaged in huckstering and marketing country produce; nor shall any such license fee be required of any person living without such city and using any horse, mule, cart, sulky, carriage or other vehicle in going into or out of such city."

Section 2672-116 provides for penalties, which may be fines or imprisonment, or both.

These seem to be the various sections to which our attention has been called, or which have come under our observation as bearing upon this question. Acting under the powers conferred upon the city council, it, on November 19, 1900, passed the ordinance which is set forth in the record, which is of considerable length and is entitled: "An ordinance to regulate and provide for the sale of milk and cream, within the city of Toledo, and to grant permits to venders thereof." The second section of this ordinance provides:

"No person or persons shall sell milk or cream within the city of Toledo without first having been granted a permit therefor by said board as hereinafter provided."

And there are in all some twenty-five sections, and it provides very fully for the examination and testing of milk which is sold in the city; for the examination and inspection of the various establishments where milk is produced; for the examination and inspection of the cattle themselves; it provides also in regard to any cattle that may be diseased or exposed to disease; it provides for the prohibiting of the sale of milk, milked from cattle by persons who have been sick or who are diseased in any way, and provides that milk shall not be sold within a certain time after the birth of a calf, and various other matters of that kind all pertaining to the sale of milk and having for their object the protection of the purchasers of milk and the obligation of selling milk of good and pure quality to the inhabitants of the city of Toledo.

Now the contention on the part of the plaintiffs in error is that they come within the exceptions of the statutes cited, and

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they show in their evidence that this article of milk which was being sold at the time these arrests were made was produced on a farm, within the county of Lucas, and from cows which were owned by Jackman—the farms being either owned or rented by him—and that Walton was working, in selling milk, for Jackman.

It is claimed and has been argued here at considerable length, that these prosecutions are illegal because, as I have stated, the acts of defendants come within the exceptions, and they had the right to sell the products of their own farms without any permission of the city of Toledo and without any inspection on the part of the city in regard to the articles sold by them. Some discussion was had as to whether this was a "license" or not; whether it came within the definition of a license. The question of licenses in the state of Ohio is one which has been discussed a good deal in regard to cases arising under the clause of the Constitution which provides that there shall be no license for the sale of intoxicating liquors and in regard to tax which is imposed upon those who sell liquors within the state. Discussion of the question and definitions of license may be found in *Adler v. Whitbeck*, 44 Ohio St., 539, 558, 559, and also as referred to by the Supreme Court of this state, in a decision of the Supreme Court of the state of Michigan found in *Youngblood v. Sexton*, 32 Mich., 406, where there is also a discussion and definition of the question of license by Chief Justice Cooley, speaking for the Supreme Court of that state.

It is held, as we understand the decision in this state, that where a tax is imposed for the sale of intoxicating liquors and the collection of the tax is enforced by a fine, or fine and imprisonment, that is to say, the party is not permitted to sell unless he paid a certain tax, and if he did sell without making payment he was subject to prosecution and to be fined or imprisoned, or both—it is held in that case that the law really amounted to a license, that the effect of that was a license, because it was a prohibition under penalties. Subsequently the law was changed and a person is not prohibited from selling, but upon those who do sell a tax is imposed, to be collected as taxes are collected, and it is held to-day in the state of Ohio, that such regulations

do not amount to a license and do not come within the prohibition of the Constitution of the state of Ohio. Judged by that test, it would seem that the clauses of the statutes to which I have referred would be held to be a license; but in the judgment of this court, this is not the principal question, nor the decisive question in this case.

In the first place, Section 2669, Revised Statutes, provides, "that nothing herein contained shall be construed to limit the power conferred upon cities and villages in Section 1692 of said Revised Statutes," which, as I have said, relates to a board of health. The act passed afterwards, Section 2672-113, Revised Statutes, *et seq.* (90 O. L. L., 335), is not a part of this original chapter, title 12, and has nothing to do with it. It was passed long after Section 2669, Revised Statutes, and is a separate and independent act relating to the city of Toledo.

We think that this ordinance is planted upon the power of the city council to regulate the sale of these articles in the city of Toledo under the statutes which I have read in regard to the board of health. We think it is a health ordinance exclusively. It is passed for the protection of the inhabitants of the city and to prevent the sale of impure milk, to prevent the spread of disease or the danger of the spread of disease among those who consume the milk as purchasers. It is needless to say that the powers of the board of health are very large. If you read the whole statutes of the state of Ohio on the subject you will find that the powers that are given to the various boards of health and the laws enacted for the purpose of protecting the people of the state from contagious diseases, and from the sale of diseased or impure articles, are about as broad as language can make them; they extend into every relation of life and the protection of health is one of the most important departments that the Legislature has to deal with, or that the city council has to deal with under the powers conferred upon it by the Legislature of the state in carrying out the general police powers of the state. As I have stated, the police commissioners are made in this city the board of health, and under Section 1692, Revised Statutes, and under this paragraph 24, the city council has conferred upon that body the powers which are set forth in this ordinance.



We are clearly of the opinion that this matter of a dollar that is charged to each wagon that is to be used in selling, does not come within the clause in regard to a license; it is simply one step in this broad ordinance for the purpose of enforcing the object which was had in view in passing the ordinance, to-wit, the enforcing of the sale of pure milk in the city of Toledo. It requires a person who is selling milk in the city of Toledo to make an application to the board of commissioners, and he is to answer certain questions and give his name and occupation, where his dairies are and where he expects to sell. It is a very simple matter in itself; and after that the city issues to him a permit, as it is called, and this tag or certificate that is placed or attached upon the wagon, and perhaps upon the cattle, to show that the party who is selling these articles has submitted to the conditions of the ordinance, to the inspection that is to be had by the authorities—the board of health of the city of Toledo—and that the milk that he is selling is from barns that have been inspected and from cattle that have been inspected, and that the conditions have been fulfilled so far as human foresight can do it, to see that the milk that is sold is a pure article. It is to enable the purchaser to rely upon the fact that the action of the board of health has been complied with.

Now, in that view of the case, and we think it is the correct view to take, this ordinance does not, in our judgment, come within the provisions of the statute with regard to a license. But, if it did, we think that the clause which excepts, in Section 1692, Revised Statutes, the legislation under it, would take it out of the statute. In other words, we think the statute does not apply and that we must look to the other sections for the powers which are conferred upon the city and for the right of the city to take the action which was taken in the passing of the ordinance and the authority of the city in enforcing the ordinance for inspection.

Criticism is made in regard to the ordinance and the powers which are given to the inspector. We see nothing in that law that is inimical to any provisions of the Constitution or to laws of the state in regard to the powers which are granted, nor do we see anything that need to frighten or trouble any person who

is intending to perform his duty of having cattle that are healthy and stables that are clean and who is intending to sell milk that is pure to the inhabitants, but it should rather be presumed that all will desire to do that, that they will comply with the statute and be enabled to say to their customers, "You can have no fear of this milk; it comes within the inspection of the city of Toledo and is pure milk." We see nothing that should be held to be burdensome about it. It is true that officers may examine the milk and may take a portion of the milk for inspection and it goes before the board of health and a record is kept of it, but the burden is no greater in regard to that matter than in regard to other matters, because in case of a contagious disease the powers of the board of health are very ample; they can close up a man's business, and perhaps his dwelling, and sequester him and his family and place them in a position where they may be protected and where the public may be protected from any evils which may result from disease, and no more seems to be required under this act than is necessary to enable the public officers to inspect the milk and see that it is of the character that is required by the ordinance. The presumption is that the officers will perform their duty fairly and justly, and if they abuse the powers that are vested in them, of course they will be held liable to the laws of the land.

Now, maintaining this view, we think that the judgment of the court of common pleas in affirming the judgment of the police court is correct and these judgments, respectively, will be affirmed.

Counsel for Walton said they did not see how he could be prosecuted; that his case was different. The provisions of the ordinances are broad enough to cover him, and, knowing the facts of the case, the conviction of Walton was as correct as that of Jackman.

*Southard & Southard*, for plaintiffs in error.

*M. R. Brailey*, City Solicitor, for defendant in error.

**RIGHTS IN PROPERTY DEEDED FOR COUNTY PURPOSES.**

[Circuit Court of Summit County.]

**FIRST GERMAN REFORMED CHURCH V. COMMISSIONERS OF  
SUMMIT COUNTY.**

Decided, April Term, 1902.

*Deed Conveying Land in Fee to County—Consideration, the Establishment of a Seat of Justice Thereon—Neither an Abutting Owner or a Private Citizen—Can Enjoin the Building of a Jail Thereon—If Such Use of the Land is a Misuse—The Prosecuting Attorney Only Can Enjoin—Distinction Between Dedication and Grant—Nuisance—Estoppel.*

1. A deed in the usual form, conveying land to county commissioners "in consideration of locating county seat of justice thereon," conveys a complete title to the county for the purposes mentioned.
2. The land having been acquired in full fee and for definite county purposes, private citizens, either as such or as abutting property owners, have no interest therein to protect; and if the property is about to be used for a wrong purpose, the public represented by the prosecuting attorney is the one to intervene by injunction.
3. Should a jail built on such land be regarded as a nuisance, an action for its abatement could only be brought as provided by the statute—that is, on the ground it is a public nuisance; and for the maintenance of such a suit abutting owners and individuals are not the proper parties.
4. Estoppel will lie against an action to enjoin the doing of a thing where no more than a doubt exists as to the right to do it, and there has been reasonable delay in the bringing of the suit, and large expense has in the meantime been incurred, of which the plaintiff may be charged with knowledge.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

This case is in this court on appeal from the court of common pleas, and it involves the right of the county commissioners to build the new county jail on what is known as the "court house grounds" in the city of Akron, Ohio.

It is claimed by the plaintiffs that the commissioners of the county hold the property upon which the jail is being built in trust for the use of the public at large, and they aver that the dedication of the property was such by Simon Perkins that they

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have such an interest in it, both on account of their being members of the public and citizens of the county, and by reason of rights arising to them by reason of their property abutting upon the grounds in question, that they have a right to bring this action and have a right to restrain the use of the property for the purposes of the jail.

The rights of the parties to this action grow out of a deed given by Simon Perkins and Nancy Perkins, the wife of said Simon, to the county commissioners on July 11, 1840.

The deed reads as follows:

“Know all men by these presents that we, Simon Perkins and Nancy Perkins, wife of said Simon, of the county of Trumbull in the state of Ohio, in consideration of the location of the seat of justice for the county of Summit in said state, on block No. 26 in the gore between North and South Akron, and in fulfillment of our promises made before and at the time of the location aforesaid to make the following conveyance in case such location should be adopted and agreed upon by the commissioners for that purpose appointed, have bargained and sold and do hereby grant, bargain, sell and convey unto the commissioners of the county of Summit aforesaid and their successors in office the following described pieces or parcels of land in the gore between North and South Akron in the county of Summit and state of Ohio;” and then the descriptions include two pieces of land, which it is unnecessary to recite.

“To have and to hold said premises, with the appurtenances unto the said commissioners of Summit county and their successors in office forever.

“And I, the said Simon Perkins, do for myself and my heirs hereby covenant with the said commissioners and their successors in office, that I am lawfully seized of the premises aforesaid, that the same are free from all encumbrances whatsoever, and that I will forever warrant and defend the same with the appurtenances unto said county commissioners, and their successors in office against the lawful claims and demands of all persons whatsoever.

“Provided nevertheless and the foregoing conveyance is upon these express conditions, viz., that a strip of land four rods in width off from north side of the piece or parcel of land first hereinbefore described, shall be laid open and be forever kept open to the public use for a public highway.”

The first piece described in the deed is this land on which the court house stands, including this street on the north. The

second piece is the parcel now occupied by the old jail. That strip of land has been appropriated to the use of the highway by the county commissioners.

“That the residue of said piece or parcel of land first hereinbefore described shall never be appropriated to any other use than that of a public square of suitable dimensions (to be determined by the discretion of the commissioners of said county of Summit for the time being) and a site for the court house and county offices for said county of Summit, with a yard of suitable dimensions (also to be determined by the county commissioners of said county of Summit for the time being) if the county commissioners of said county shall at any time think proper to make such yard separate from the public square, and that the piece or parcel of land secondly hereinbefore described and conveyed (in block No. 27) shall be forever set apart and appropriated as a site and lot for the jail of said county of Summit.”

That lot is not involved in this action.

And the same is attested, signed, acknowledged and sealed.

The first question involved in the determination of this case is what title was transferred to the commissioners by this deed of the lands in question?

There is no evidence in the case showing the consideration paid by the county commissioners for the deed, and the consideration is to be determined entirely from the recitals in the first part of the deed, and the recital is, “In consideration of the location of the seat of justice for the county of Summit in said state, on block No. 26 in the gore between north and south Akron, and in fulfillment of our promises made before and at the time of the location aforesaid to make the following conveyance in case such location should be adopted and agreed upon by the commissioners for that purpose appointed.”

This is equivalent to saying that the grantor in the deed had agreed with certain commissioners appointed for the location of the county seat in the county and the place where the court house should be built to deed to them the lands in question for the purposes indicated in the deed.

Then the deed has in it in full the language usual in granting a deed: “Have bargained and sold and do hereby grant, bargain, sell and convey unto the commissioners of the county

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of Summit aforesaid and their successors in office" the real estate named in the deed; and the *habendum* clause is, "To have and to hold said premises, with the appurtenances unto the said commissioners of Summit county and their successors in office forever." And the deed contains in it full warranties of title.

The deed, in and of itself, contains all the elements necessary for the conveyance of a fee simple to the county commissioners; and it is not unlike *Avery v. United States*, 45 L. B., 144 (104 Fed. Rep., 711). In the conveyance in that case the deed was in the usual words of a fee simple deed and contained covenants of seizin and warranty. The conveying clause, after describing the property, concluded with the words "as and for a public street of said city," and the court in that case say:

"The deed of Leonard Case can not in strictness be regarded as a pure donation. We have no other evidence as to the consideration than that shown by its recitals, and by the ordinance of the city granting to the vendor, in consideration of his conveyance, the right to occupy a portion of the sidewalks upon the four sides of the lot retained by him, and subsequently conveyed to the Cleveland Library Association. His deed recites that the consideration for his conveyance is one dollar, 'and divers other considerations received, to my full satisfaction, of the city of Cleveland.'"

And the circuit court of appeals held that that granted the fee to the city.

The granting clause, the *habendum*, the warranty and the expression of the consideration in the deed were in character the same as is found in the deed before the court. The restriction in that deed was "as and for a public street of said city," which, in its form and expression, differs somewhat from the deed under consideration; but whether that difference gives rise to a different law in regard to the deed it is not necessary to consider in the view we take of this case. But we regard *Avery v. United States*, *supra*, as quite conclusive on the question that in the deed before the court the county commissioners took a title in fee simple.

In *Smith v. Heston et al, Commrs. of Butler County*, 6 Ohio, 101, the facts were not unlike those in this case. The county of Butler was erected in 1803, and commissioners were appointed

to fix the seat of justice therein. Before the place of the seat for justice was agreed upon, the proprietor of the town of Hamilton proposed to the commissioners, in writing, in case that town should be selected as the site, "to give, for the use of the county, a square for public buildings, agreeably to a plan of the town, etc., also a square for the church and burying-ground, consisting of eight town lots, together with the commons in front of the town, for public uses, such as boat yards, etc.," and to "pay two hundred dollars towards erecting of public buildings, or court house." The county seat was established at Hamilton and the two hundred dollars paid by the proprietor; but before the square for the public buildings was conveyed he died. The court thereafter ordered a conveyance in execution of the contract, in pursuance of which the representatives of the proprietor made a deed to the commissioners of the county conveying the square for the use of public buildings for the inhabitants of the county of Butler.

Under these facts and the deed given, the case holds, in substance, the county got a complete title. And we hold in this case that the granting of these lands by the deed in question was not a dedication of the lands to the use of the public in general, but were given to the public for certain and definite purposes so far as the building of the court house is concerned, in which property the public at large took no interest at all as individuals.

In the case last above cited the county commissioners made a lease of the premises for private purposes, and the action was brought by persons who claimed individual rights in the grounds devoted to public buildings and asked an injunction to stay the proposed leases. A demurrer was filed to the bill, and Judge Wright, in his opinion, says:

"Unless the complainants have a right, as individuals, to interfere to protect county property, conveyed to it for the use of public buildings, and restrain the county commissioners, the agents of the county, from using such property, as in their judgment may best promote the object of the grant, and the public interest, the bill must be dismissed. The right to interfere is sought to be sustained from analogy to the class of cases, where one of many commoners or parishioners seek to restrain from infringing the common right, or to establish a general

modus. The analogy, in our opinion, does not hold. In those cases, the right to proceed depends on the fact that each commoner or parishioner is injured in his individual rights. In another class of cases where a great number are separately interested in the same subject, one or more, for convenience, and to prevent delay, may litigate the right in chancery, for himself and others interested; and the court having these parties before it will so control as to protect the rights of all concerned. The case before us, does not, in our opinion, belong to either of these classes.

“The present is an attempt, by two or three individuals, to enforce the rights of the county, and guard the county property from forfeiture. This court, in *Putnam v. Valentine*, 5 Ohio, 189, has determined, that ‘rights purely public, are to be enforced in the name of the state, or the officer entrusted with the conduct of public suits.’ If the rights of the county of Butler are violated or threatened, redress must be sought in the name of the county, or its acknowledged agents. There is no pretense in the bill that the complainants have any individual interest in this square, as tenants in common, or otherwise, which they ask us to protect. They are mere volunteers to take charge of the public or county interest, without ever having been entrusted by the county with the performance of such duty.”

I have quoted at length from this case because it seems to us very much in point.

And having determined that the parties bringing the action had no right or interest in the property as individuals, either by reason of their having property abutting or in proximity to the public buildings, or as members of the public, the bill was dismissed.

In the case of *Widow and Heirs at Law of Reynolds v. Commissioners*, 5 Ohio, 204, the syllabus is:

“Where real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could.”

In that case, in 1819, B. Wells, for certain considerations received from the treasurer of Stark county, conveyed by a deed, with general warranty, lot No. 30, in Canton, Ohio, to the then commissioners, to hold for the use of the county, thereon to erect a court house, offices, etc., and for no other purpose. That



deed contained a proviso that it should be void if the lot should be appropriated to any other purpose. On May 23, 1823, Wells released to the commissioners all his right in reversion in that lot. The commissioners made an agreement to lease to Reynolds, the ancestor of the plaintiff, thirty feet front from the west part for ninety-nine years, renewable forever, at the rate of eighteen dollars per annum, but not to be subject to any occupation likely to interfere with the due enjoyment of the rest of the land; and, during the pendency of this suit, Reynolds died, and the suit was revived in the name of the widow and heirs. The commissioners denied the right of their predecessors to make the contract of lease and denied that they had any right. The court holds that after the deed was given conveying any right of reversion, or any and all rights in the property, that the county commissioners became the entire owners of the property; and the question was whether the property was in the commissioners in trust by reason of its being a donation of the property. The court say: "If the land be made subject to uses expressed on the face of the deed, which can not be enjoyed consistently with the exclusive dominion and enjoyment of the alienee, perhaps the trust might be enforced. As where lands were given to a municipal corporation, to be holden for a common walk, or public fountain, perhaps the purchaser may take it, subject to the rights of the inhabitants." But the court say "that when property held for general corporate purposes is aliened, even for purposes not corporate, such alienation is absolute."

We understand this case to hold distinctly that there was no trust, either expressed or implied, in the conveyance of this property to the county commissioners, there being no trust to the public, and the property being held by the commissioners for corporate purposes, that they might sell or dispose of it in any manner that to them might seem best.

The first conveyance of Wells to the commissioners had in it a condition that it was to be void in case the lot was appropriated to any other purpose than to erect the court house and public offices. Wells released his reversionary interest to the commissioners by which then it became their absolute property for general purposes, and subject to alienation by them. But

if the first deed placed it in trust in the commissioners and thereby the public at large took an interest in the property, the second deed could not destroy that trust nor subvert the rights of the *cestui que trust*, and the case is in effect holding that the public never had any interest in the property.

In *LeClercq v. Trustees*, 7 Ohio (pt. 1), 218, Judge Lane, in this case, seems to mark with clearness the rights of the citizens or residents of a town under the circumstances of these cases cited.

“The fee of lands dedicated to public objects sometimes passes directly to the corporation, for whose use it is intended, and is sometimes held by a corporate town or by a county, in trust for the uses designated. In the first case, as where land is given to a town, for corporate purposes, a vesting by the present statute (29 O. L., 351), or where land is acquired by a county by purchase, or where given for county objects, a vesting by Section 4 of the act of 1800 (2 Ter. Laws, 43), an absolute estate is held by the corporation, which they may alien (*Reynolds v. Commissioners*, 5 Ohio, 204), and third persons are not permitted to interfere with the management of its agents (*Smith v. Heuston*, 6 Ohio, 101). But when such corporation takes as trustees, to hold to prescribed uses, the *cestui que use* acquires a vested estate, the enjoyment of which may be obtained in chancery. In this case, the land was either vested in the town for the use of the inhabitants, by the general acts of dedication, or it passed to the county by the statute, to be held for this use.”

And then the court states that in the case it is in the trustees for the benefit of the public at large, one or more, especially one whose property is affected in value, may enforce the execution of the trust.

In the case of *Avery v. United States*, *supra*, the same law is established by the circuit court of appeals.

The distinction between dedication to the public use and that of grants to individuals, of either estates or easements, differ somewhat in their character, and they differ both in the manner of and evidence of its accomplishment, and in the character of the interest bestowed on the public, as well as in the character of the rights which individuals are privileged to enjoy therein. And it differs also from a grant of lands to the public, as an individual in the organized form of a municipal corporation or

board of county commissioners for the individual use of such corporation. These corporations are authorized to hold lands as individuals hold for the purposes for which they need them in their corporate capacity, and they convey lands thus held for their corporate purposes in the same manner as individuals. The rights embraced in a dedication of land to public use differ from either of the foregoing. In that case the public, as an organized body, has no right to appropriate it, or any part of it, to its individual use; for it has no right, as a corporate body, of property therein. Its rights are passive and not active, and whatever right there is in the property by way of the easement is really vested in the public, and the officers representing the public organization manage it and control it merely as trustees for the public, for whose use it is dedicated.

In the deed of Simon Perkins to the county commissioners, a part of the lands that are to be used for court house purposes and buildings for the officers of the county, and also for the public square, and is to be divided and appropriated to each purpose separately at the will and discretion of the county commissioners. The commissioners have never divided the property any farther than to indicate by what it is now doing, which part it intends for the buildings named in the deed. The intent of the commissioners, if any intent appears, seems to indicate that the court house is to occupy the southerly part of the grounds in question, and the northerly part is to be devoted to a public square. The southerly part is that part against which the property of the plaintiff abuts, and, under the authorities just referred to, when the commissioners have set aside the property on the southerly side for court house and office buildings, or building, then that property being devoted entirely to the purposes of the corporation, as was intended by the grantor in the deed, the plaintiff gets no interest in that property whatever, neither by reason of his property abutting against the same, nor from the fact that he is a member of the public.

If the northerly side of the property is intended for a public square, which is not a use devoted entirely to the public necessities of the county, it is not involved in this action, as the commissioners are not undertaking to build a jail upon that part.

If the southerly part of the grounds are to be devoted to county purposes, then the commissioners can not be restrained for devoting it to county buildings not strictly in harmony with the provisions of the deed. If they are varying from the conditions therein named, it is a matter that does not concern the individuals of the town, whether they suffer peculiar and special damages thereby or not; but it becomes a matter for the public officers, and if they are going contrary to the provisions in the deed, it may be the duty of the county prosecutor to commence an action to restrain such use, but such action is not open to individuals, whether suffering special or general injury thereby.

It is said the building of the jail on the lot is a nuisance. If it is a nuisance, it is a public nuisance, and an individual has not a right to bring an action to abate a public nuisance. The state has provided by law the manner in which such actions may be brought.

If it is contended that there has not been such a separation of the land into building purposes and park purposes that it can be claimed in this case that the south portion of the land is devoted to county purposes, then we are inclined to think that until such division is made there is no action open to individuals. It was the intent of the grantor that the grounds in question should be used in connection with the court house as a court house yard or green, and for county purposes in connection with county business, to insure plenty of light, air, and safety from fire in cases of buildings on adjacent properties burning, and this is important to the county to protect its records; and for public sales, as a place for meeting of the militia, in those days, of the county. The deed provides for the ornamenting of the grounds as a park. The intent is to have the grounds for county purposes, but arranged and beautified as a park, not that this ornamentation should in any way destroy the county use, but to make attractive and inviting the grounds for such use. The primary use and purpose intended was for county purposes, the other is only to add to the pleasure of the primary use. The same purpose is not rebutted by permitting a yard to be fenced off around the court house. This view enables

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the county commissioners to accept and hold the deed under the state (29 O. L., 351), but if deeded for park purposes purely they could not accept, it is claimed, and we are not prepared to say they could. These grounds then having been acquired, not by dedication, but by deed in full fee, and for county purposes, the plaintiff has no interest in the property. Having no interest in the property it has no right to protect. If the property is being used for a wrong purpose, the public, represented by its proper officer, is the only one to institute suit to protect the county.

It is claimed in this case, and evidence has been offered to sustain that claim, that the plaintiff is estopped by reason of the delay in bringing the action. It is claimed that the county commissioners had expended some seven or eight thousand dollars upon the erection of the jail; they had let their contracts and gone to large expense and trouble in and about the matter, and that the plaintiff remained silent during all that time.

If we are right in our conclusion heretofore that the plaintiff has no right in any part of the grounds in question, either by reason of special or general damages done to it, then this matter of estoppel is not material in this case; but if we are wrong in that conclusion, and the plaintiff had a right to bring this action, then its delay has been unnecessary and injurious to the county commissioners. The advertising and letting of contracts was of such a public character that they ought to be charged in this action with notice of the intention of the commissioners to build the jail upon these grounds long before the time that any action was commenced or any move made by them looking to a contesting of the right to the building of the jail where it is. But it is said that the county knew it had no right, and that it proceeded knowing that it had no right to build the jail upon these grounds, and that, therefore, an element of estoppel is wanting which will defeat the claim of estoppel by the defendant.

But if we are right in what we have said in determining this case thus far, there was at least a doubtful question whether the commissioners had not a right to build the jail where they are now erecting it, and that question was one of so much doubt

that it called to the plaintiff to act without delay, and is not a case where a party enters upon land where he knows he had no right to enter thereon, but it is a case where he may claim that he has a right, and where nothing more than a doubt in regard to the matter can exist, and hence we think the evidences of estoppel are found in this case. And if we are wrong in holding that the plaintiff has no right to bring this action at all, then we hold that he is estopped from insisting that the county has no right to use this land for any purpose in harmony with the general purposes declared in the deed.

It is claimed by defendant that plaintiff will suffer no injury by reason of a jail being built where it is; that its property will not front the jail, but only the rear portion, and the distance will be over twenty feet between the buildings, not counting the extension of the portico on the south side.

In the view we take of this case it is unnecessary to determine this question, but the plaintiffs' loss, if any, will be as nothing almost compared with defendants' loss, if this injunction is allowed. We have determined that the case must be disposed of on the questions that we have herein discussed, and in which we have concluded that the plaintiff has no cause of action, and its petition is dismissed.

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Guernsey County.

**FRAUD IN THE SALE OF WOOL.**

[Circuit Court of Guernsey County.]

JOHN HOGUE V. STATE OF OHIO.

Decided, April Term, 1902.

*Criminal Law—Fraud in the Sale of Wool—Requisites of Indictment Under Section 7069-3—Insufficient Indictment—Effect of a Plea of Guilty to—Motion in Arrest of Judgment Must be Granted—Notwithstanding Fine and Costs Have Been Paid.*

1. An indictment charging fraud in the sale of wool under Section 7069-3 must allege that unwashed wool was sold as washed wool, and that the fleeces were wrapped in a manner calculated to defraud, and there must be definite and certain statements as to substances alleged to have been concealed in the fleeces.
2. A motion in arrest of judgment must be sustained where entered under a plea of guilty to an insufficient indictment, and this is true notwithstanding the fine and costs imposed have been paid.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

John Hogue was indicted for the fraudulent sale of wool. His attorney waived arraignment and entered a plea of guilty for him, he being present in court at the time. He was adjudged to pay a fine and the costs of suit and now prosecutes this proceeding in error to reverse the judgment of the common pleas court.

The indictment was found under Section 7069-3, Revised Statutes. This section provides:

“That it shall be unlawful for any person or persons to sell any wool washed on sheep’s back or otherwise containing any unwashed tag-locks or any unwashed wool of any kind, or black wool or part of buck fleeces, or other substance foreign to the fleece or fleeces, which is calculated and intended to defraud the purchaser thereof.”

The charging part of the indictment sets forth:

“That John Hogue, late of said county, on June 14, 1901, unlawfully sold wool containing unwashed wool and parts of buck’s fleeces and other substances foreign to the fleeces of said wool, to one John Davidson with intent then and there, and thereby him, the said John Davidson, to defraud.”

The selling of unwashed wool as unwashed wool would certainly be no offense; and the same might be said of the sale of fleeces of black wool or parts of buck's fleeces. The intent of the Legislature was to provide that a party should not fraudulently wrap up in a fleece of wool sold as unwashed wool, and supposed to be cleansed from all worthless or inferior substances, the very substances from which it is expected to be free.

This indictment is again defective for the reason that it does not plead the important fact that the wool so sold was put up in a manner calculated to defraud the purchaser. The indictment does not aver that the wool was sold with the intent to defraud, but that is not enough; it must not only be sold with the intent to defraud, but it must be put up in such a manner that the fleece or fleeces containing these inferior qualities and worthless substances would be calculated to defraud the purchaser. However much a fraud was intended, if the sale was not made in a manner calculated to defraud, no crime was committed. As suggested by counsel, if the unwashed wool, tag-locks or parts of buck's fleeces were wrapped upon the outside of the fleece or fleeces and the washed wool was within, no one would be deceived and no offense committed. The gravamen of the offense is in the wrapping up of the fleece or fleeces in a manner calculated to defraud. The indictment is wholly silent in this important particular.

Again, the indictment charged the accused with selling wool "containing unwashed wool and parts of buck's fleeces and other substances foreign to the fleeces of said wool." What other substances foreign to the fleeces? The indictment should be definite and certain. The accused had a right to be informed as to the character of the substances alleged to be secretly placed among the wool sold. It is not always good pleading to make the averment in the language of the statute. If the language of the statute is of such a character as to inform the accused fully and distinctly of the facts upon which the state relies, then it is sufficient; if it is not, then it is insufficient. *Sutcliffe v. State*, 18 Ohio, 469; *Sharp v. State*, 19 Ohio, 379; *Lougee v. State*, 11 Ohio, 68, 69; *Lamberton v. State*,



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11 Ohio, 282; *Poage v. State*, 3 Ohio St., 229; *Dillingham v. State*, 5 Ohio St., 280.

This language is not surplusage. The accused might be convicted of placing unwashed wool, parts of buck fleeces or "other substances foreign to the fleeces of said wool." Proof of placing any one of the objectionable substances in the fleeces would be sufficient to sustain the indictment if properly pleaded. The indictment is insufficient in all three of the particulars referred to.

The next question is, what is the legal effect of the plea of guilty by the counsel of the accused and the payment of the fine and costs? If the accused had been convicted by a jury, the verdict would have been of no avail, although the accused had submitted voluntarily to a trial without interposing any objection to the indictment. A motion in arrest of judgment must have been sustained; and, even if no motion in arrest of judgment had been made, advantage could be taken of the defect in the indictment upon a petition in error.

We think a motion in arrest of judgment must have been sustained after the plea of guilty. The indictment being wholly insufficient, there was nothing to base the action upon. The accused did not plead guilty to any crime, but to an indictment that charged no crime. He could not plead the judgment in bar of another prosecution and perhaps might have been released from imprisonment by a writ of *habeas corpus* had he been imprisoned for failure to pay the fine and costs. The fact of the accused paying the fine and costs could not validate the judgment. Such payment would of necessity be involuntary as made under duress to prevent imprisonment.

In 17 Am. & Eng. Enc. Law (2d Ed.), 588, under the head of "Jeopardy," it is said:

"So where the indictment or information is so defective in form or substance that it will not support a valid judgment, it can not form the basis of proceedings which will put the defendant in jeopardy, and bar another prosecution."

A large number of authorities are cited to sustain the text.

In *Davis v. State*, 19 Ohio St., 270, the defendants were indicted for violating the law against gaming. The indictment

contained two counts—one for keeping a room to be occupied for gambling, etc.; and the second for keeping and exhibiting gaming devices, etc. The accused pleaded not guilty to the first count and guilty to the second count of the indictment, and judgment was entered upon the plea of guilty. Thereupon the court entered a *nolle prosequi* to the first count of the indictment. Upon petition in error filed in the Supreme Court the error assigned was the insufficiency of the indictment. The Supreme Court held the indictment insufficient to charge a crime, reversed the judgment and discharged the accused. The question as to the effect of the plea of guilty was not raised or decided, it being assumed no doubt that it had no different effect than that of the verdict of a jury.

The conclusion to which we have come makes it unnecessary to consider the question as to whether or not an attorney has authority to enter a plea of guilty to an indictment with the consent of the accused.

The judgment of the common pleas court is reversed at the cost of the state and the plaintiff in error is discharged.

*Bowers & Buchanan* and *Fred. L. Rosemond*, for Hogue.

*A. L. Stevens*, Prosecuting Attorney, contra.

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Lucas County.

**APPROPRIATION BY MUNICIPALITIES.**

[Circuit Court of Lucas County.]

**ELIZABETH WEBER V. CITY OF TOLEDO.**

Decided, October, 1901.

*Municipal Corporation—Appropriation of Property by, for Street Purposes—Award not Paid—May be Recovered by Devisee of the Owner at the Time of the Appropriation—Form of Action—Statute of Limitations—Evidence of Intention to Dedicate—Conclusiveness of the Award.*

1. A widow has the right, as the devisee of her husband's estate, to bring an action in her own name against a municipality for recovery of the amount assessed, but never paid, in proceedings brought during the lifetime of her husband for appropriation for street purposes of land belonging to him.
2. Such an action falls under Section 4977, and is not barred for twenty-one years.
3. The remedy of a property owner whose land has been taken by a municipality without payment therefor is in a suit for compensation. An action in ejectment is not open to him against the municipality.
4. The voluntary laying of a sidewalk by an abutting owner of property appropriated by a municipality for street purposes, without payment being made therefor, can not be construed as an intent to dedicate to public use the property so appropriated, or as a waiver of the right to recover payment therefor.
5. Where a municipality in proceedings for the appropriation of property designates a certain person as the owner thereof, and proof is offered of the purchase by him of the property prior to the bringing of the suit, the municipality is precluded from denying many years later that the title was in the person in whose favor the judgment for the value of the property was rendered.

HAYNES, J.; PARKER, J., and HULL, J., concur.

Elizabeth Weber brought suit in the court of common pleas against the city of Toledo, in which she set up that about February 15, 1875, the common council of the city duly passed the necessary legislation to open Niagara street a certain width; that on June 21, 1875, the common council passed an ordinance to appropriate the lands described in the petition, being parts of lots 228 and 248, Stickney's addition, and also parts of lots

223 and 224; and on September 12, 1875, the city council made application to the probate court, and steps were taken whereby the amount of compensation to the owners was assessed, and it states the amount. And she says these amounts have never been paid. She says in her petition also that the city did not take the land so appropriated, and nothing further was done until about the year 1886, when the city entered upon the lands, and graded them, and they have been taken and used for a street ever since. The precise ordinance under which the grading was done has not been set out, but it is admitted that the work was done under the authority of the city of Toledo. She says that one of the lots was conveyed to her husband in 1878, as I understand it; a portion of lot 224 was conveyed to Jacob Weber in 1875, February 12th, by warranty deed, and the north half of lot 223 was conveyed to Webber by Valentine H. Ketcham February 8, 1878, and they owned the other lot before. Jacob Weber died somewhere about 1888 or 1889, I believe, and by his last will and testament he gave all this property to his wife, the plaintiff herein, who has been and remained in possession of it ever since.

It is claimed on behalf of the city of Toledo that the plaintiff has no right to sue; that even if the city was liable to pay the appropriation money, the administrator or the executor of the will of Jacob Weber was the proper party to bring suit. It is claimed also that the statute of limitations is a bar to the action; also, that there has been a dedication of the lots by the Webers.

The testimony shows that the Webers were in possession of the property up to the time that the city graded the street, and had fences around it; that the city tore down the fences, graded the street, and took possession of the property, and subsequently the Webers built a sidewalk along that side of the street for the benefit of people living on that side of the street.

It is not necessary that I should spend very much time on the case. There are two cases which settle some of the questions for us, at least. The first case is one decided by this court at the March Term, 1887, the court then being composed of the original members, Upson, Baldwin, and myself. This

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is *Toledo v. Groll*, 2 C. C., 199, in which John Groll brought suit to recover the amount of \$1,831 that had been awarded to him in certain proceedings brought by the city in the probate court to extend East Broadway across Groll's land in East Toledo. The land had been appropriated in 1873. The city council passed a resolution directing the street commissioner to take possession of the land and open the street, but the street commissioner did not do it. The matter remained in that condition until 1883, when the city council again passed a resolution directing the street commissioner to open the street, which the street commissioner did; and in 1884 the plaintiff began his suit, being eleven years after the award had been made. To that a contest was made by the city, and a decision was rendered by the court. After citing the statute, Section 2260, Revised Statutes, we cited from the opinion of Judge Gilmore in delivering the opinion of the Supreme Court in *Ryan v. Hoffman*, 26 Ohio St., 109, 120, wherein the judge said:

"The provisions of this section are evidently intended for the benefit of the landowner, preventing as they do the land from being hung up in uncertainty for an unreasonable length of time; and a strict compliance with its requirements could be waived by the owner. An acceptance of the money assessed as compensation after the expiration of six months from the date of the assessment and delivery of possession, would constitute such a waiver and operate as a ratification of the proceedings."

At page 122 of the same case he says:

"The second objection is that even if the city takes and pays for the property condemned, it takes the title by purchase, and not by appropriation, and hence can not assess the expense on the adjoining property. From what has been before said, it will appear that there is no force in this objection. We think the city will take the title by appropriation; but the right to assess the expense upon the adjoining property depends upon other provisions of the municipal code and other proceedings not before us."

This case was a proceeding in mandamus to compel the city to pay the amount of the assessment of compensation made by the jury.

We further cited in the same case, *Trustees C. S. Ry. Co. v. Haas*, 42 Ohio St., 239, where the court held that the failure of the corporation to pay and take possession of the land within six months was no bar to a proceeding by the corporation to appropriate the same property for the same public use, and that the case was governed by the same rule as in case of municipal corporations. This court, then proceeding in announcing its decision, said:

“We have said that we find upon the city’s making the order in 1883 and taking possession of the property, that it was proceeding under the order for the appropriation, and was seeking to take the property by virtue of that appropriation, and we think the true rule is that the owner of the property had his election to waive the forfeiture of the city to take within the six months and to demand of the city the amount of compensation assessed by the jury at the time the city took possession in 1883; and that by the demand he made of the city for the award of the jury, and the bringing of this suit for the same, making no objection to the city opening the street, he ratified the appropriation and is entitled on the facts stated to recover the amount of the assessment made by the jury. The court below having so found, its judgment is affirmed.

“Question is made as to when interest should commence to run upon the assessment.

“The plaintiff below had the use of the property during the time from 1878 to 1883, with full right to dispose of or sell the same free from the order of appropriation, and at the time of taking the property in 1883, had the right to elect to take the compensation awarded or to have a new assessment made. We therefore are of the opinion, that interest should commence to run from 1883; and the court below having so found, we affirm the judgment in that respect.”

That case went to the Supreme Court and was affirmed without report. *Toledo v. Groll*, 23 Bull., 220.

*Clark v. Cleveland*, 9 C. C., 118, is a case that is also applicable to this one, besides containing some good law. It was decided in Cuyahoga county in 1894, and was tried before Judges Baldwin, Caldwell and Hale, Judge Baldwin having sat in the case from which I read, *Toledo v. Groll*, *supra*. I will read the syllabus:

“After conditional judgment in favor of the plaintiff in error under 66 O. L., Section 537, p. 240, Revised Statutes, 2260, in appropriation proceedings against the city of Cleveland, he conveyed the lands in fee simple. Thereafter, and after the expiration of the six months provided for in that statute, and without any new appropriation contract, the city took possession of the land, but did not pay therefor.

“*Held*: The right of the vendor to receive the damages under the conditional judgment had ended, and the right of action for damages for the taking of the land accrued to the vendee.”

It will be observed that the facts of the case are exactly like those of the case at bar. After stating the facts of the case, and after citing the case of *Toledo v. Groll*, 2 C. C., the court say:

“We think that was good law. The property owner had the election at the time of the city taking possession to determine how he would sue for the amount awarded him. We do not think that a *former* owner of that land, who had *parted* with that land by warranty deed in fee simple, had the right to make such election and require payment by the city to him for that land of which he had long ceased to be the owner. We are therefore of the opinion that when, after the six months expired, the city took possession of that ten feet, the right to recover for that was in Mercy J. Phillips, and not in Clarke. The decision of the court of common pleas is affirmed.”

That sustains the position that the plaintiff in this case is the one authorized to sue; and so we hold.

Now, in regard to the statute of limitations. The title in this property being in Mrs. Weber, and she having the right of election when the property was taken, we think she should not be cut off short of twenty-one years (Section 4977, Revised Statutes), and that the six years statute (Section 4981, Revised Statutes), does not apply to the case.

It is claimed here that there had been a dedication of this property. We are clearly of the opinion that there had not been a dedication, or anything from which the jury could infer that there was a dedication. The statute (Section 2232, Revised Statutes, *et seq.*), provides that where land is taken for and used as a street, the compensation shall be made, but it does not say that it shall be first made. It is held by the Supreme

Court that the rule that applies to railway companies does not apply to streets. The city takes possession of a street. The owner of the property can not eject the city from the street, as we understand the case, and the only remedy that is left him is to seek to obtain the compensation which is allowed him; and we think in a case of this kind, any act like putting a sidewalk on the street which the city has a right to improve, and and we think in a case of that kind, any act like putting a sidewalk was laid down by order of the city or voluntarily by the owner, for the purpose of enabling persons passing on the street to use it, can not be construed into any act which shows an intent to dedicate the property to the public. The owner of the land does not waive his rights by any such act as that. To be a dedication there must be a clear intention to dedicate, and that evinced by acts that clearly show such intent to dedicate. We think no act of this kind can be construed to show any attempt to dedicate. Plaintiff in the case says that she never had dedicated. She went out to object when they came to open the street, but I think she did not go into that, or was not allowed to; at any rate, nothing further was said about it. She says her husband always during his life said he never would give any of his property, not even a shovelful, to the city.

We therefore hold that the judgment of the court of common pleas should be reversed and a new trial awarded.

*T. L. Gifford* for plaintiff in error.

*M. R. Brailey* and *J. P. Manton*, for defendant in error.

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CITY OF TOLEDO V. ELIZABETH WEBER.

HAYNES, J.; PARKER, J., and HULL, J., concur.

Heard on error.

Petition in error is brought here to reverse the judgment of the court of common pleas in an action brought by Elizabeth Weber in the court of common pleas against the city of Toledo. The case has been here once before, and the principal questions have been decided so far as this court is concerned.



The controversy arises out of certain awards made by a jury in the probate court of this county for the opening of Niagara street in the city of Toledo, and was in regard to a portion of lot 223 Stickney's addition, as well as lot 224 in the same addition. The matter, so far as pertained to lot 224, was decided before. The judgment of the court below was substantially in accordance with the views of this court. The principal controversy here arises in regard to some matters which were set up in a subsequent pleading and certain questions which arise in regard to the northerly thirty feet of the northeasterly one-half of lot 223, and the subject of controversy amounts to \$87 in money, being the amount said to have been awarded by the jury to the owner of the property.

The record discloses that there was in regard to that street a dedication made by certain of the property owners under date of June 29, 1870; but it appears that there were nine parcels of land abutting on this street whose owners did not sign, and subsequently, on September 16, 1875, the city filed in the probate court of this county a petition to appropriate the property abutting on this street. The record discloses that the appropriation was for those parcels of property said to be owned by those persons who had not signed the dedication or plat—so far as those who dedicated on the plat was concerned, the city rested upon that and apparently accepted the plat—at any rate, they did not appropriate the property.

In 1890, perhaps, the city took possession of the property and opened the street, and the right of the parties in regard to the question as of that date is discussed and is already decided and will not be repeated here. The controversy now is about this \$87 and about the thirty feet of the northeasterly half of lot 223, and we find this state of facts disclosed, and we think established by the plat. Mr. V. H. Ketcham owned the property and had owned it perhaps for some years prior to 1870. Prior to that time, however, a man by the name of W. G. Forbes claimed to own the thirty feet by purchase from Ketcham. He built a house upon the property and lived in it with his wife. Subsequently his wife died, and after her death he rented it, and subsequently sold it to Mr. Weber, the husband of the

plaintiff, who went into possession of the property. It appeared that at the time Mr. Weber purchased from Forbes there was some balance still due to Mr. Ketcham, and Mr. Weber made payment or payments and received the title, not from Forbes, but direct from Mr. Ketcham, the deed having been dated in 1878.

The court charged in regard to the matter, and directed the jury that the dedication of the plat signed by Ketcham was binding upon the plaintiff, and she could not recover for the \$87; and in that we think the court erred. Now, as I have said, Mr. Forbes was in possession of the property, claiming to be the owner, and we believe that was *prima facie* evidence that he was the owner. He continued in that possession, and seems to have been in possession at the time proceedings were filed in 1875. The city of Toledo in filing a petition reciting the necessity of opening the street, etc., says: "The following described parcels of real estate are *owned* by the parties hereinafter named." In the third paragraph it says: "The northerly thirty feet of the N. E. one-half of lot 223 Stickney's addition, which lies within the proposed line of Niagara street and *owned* by W. G. Forbes."

The statute under which they proceeded requires them to give notice to the owners; and Section 2245, Revised Statutes, provides:

"The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to each owner may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land."

When the jury came to make their assessment they assessed to W. G. Forbes \$87.50. It was said that Mr. Ketcham was a party to this suit; and that was true, but he was not named as the owner of this portion of lot No. 223, but Forbes was named as the owner; and Ketcham was named as to another portion of the lot which was alleged to be owned by V. H. Ketcham and Jerome Wellman, and that is the only place in which Mr. Ketcham is named, and when it came to that particular portion, they awarded to Ketcham and Wellman \$87.50,

and the city ascertained then that the ownership was in Forbes.

Forbes, as the testimony showed, purchased this property prior to the date of the dedication and was in possession prior to that time and did not sign the articles of dedication. Mr. Ketcham, when he signed, signed generally, without naming any specific portion of the property, but simply signed his name.

We think the city is bound by this record in regard to the \$87.50. It ascertained that Forbes was the owner and caused an award to be made to Forbes as the owner, and to no other person, and we think it is too late for the city to come in now and say that Mr. Ketcham was the party who owned the property and that he is entitled to the money, and that the judgment of appropriation should be in his favor, or that the articles of dedication would bind Mr. Weber. We think there can be no question under the law, as we have stated it heretofore, that Mr. Weber, when he purchased this property and took this deed, took the whole title to the property and succeeded to the right of Forbes in the property and that he is entitled to this \$87.50.

It is said in the petition that the city had not made any payments, but the city nowhere claims to have made any payment to Forbes or to anybody else for that property; it seems to have just cut the matter, so far as payments are concerned, when it came to open the street and claimed the whole property. In that view of the case we think the court erred in holding that these plaintiffs were not entitled to this money. The case has been tried and we think we have all the evidence before us. With the evidence as it stands, we will reverse so much of the judgment as finds in favor of the city in regard to the \$87.50 and render such judgment as the court of common pleas should have rendered, and give judgment for Mrs. Weber for that sum of money. The details can be drawn out in the journal entry. The interest may be computed the same as in the other case, and it may be so far modified as to include it all in one judgment.

*M. R. Brailey and John P. Manton*, for plaintiff in error.

*T. L. Gifford*, for defendant in error.

**THE BEAL LAW CONSTITUTIONAL.**

[Before Judge John M. Cook, sitting in Guernsey County.]\*

**JOHN LLOYD v. JOSEPH B. DOLLISIN, SHERIFF.**

Decided, 1902.

*The Beal Law—Not in Conflict with Section 26 of Article II, or Section 18 of Article I, or Section 11 of Article III of the Constitution—Contains no Unlawful Discrimination—The Feature as to Sale by "Wholesale"—Jurors Taken from the Whole County—What Shall Constitute Prima Facie Evidence of Legal Election—Distribution of Fines.*

1. The provisions of Section 26 of Article II of the Ohio Constitution, that general laws shall have a uniform operation throughout the state, does not make it necessary that the law shall operate uniformly upon every person and every foot of territory within the state; and the fact that Sections 4364-20, *et seq.*, known as the Beal Law, have no application to those portions of the state not within the limits of municipalities, does not bring them within this constitutional prohibition.
2. Nor does the provision of the Beal Law, which permits of a resubmission after two years of the question of the sale of intoxicating liquors in a municipality, render it possible to suspend the law within the meaning of Section 18 of Article I of the Constitution, which provides that the Legislature alone can suspend laws.
3. Nor is there an attempt to grant the pardoning power to the people, in contravention of Section 11 of Article III, by the permitting of a second election, for the fact that the second election was in favor of "the sale" would not absolve from an offense committed while the sale was prohibited.
4. Nor is there any violation of Sections 1 and 2 of the Bill of Rights or of the Fourteenth Amendment of the Federal Constitution in the discrimination that is made between persons living within and without municipalities, and between manufacturers selling at wholesale and dealers; and the provision as to sales by wholesale incapable of execution because of its indefiniteness.
5. There is no violation of the rights of one being prosecuted under this law in that he must be tried before a jury selected from the whole county, rather than from the municipality within which the offense was committed.
6. It is clearly within the power of the Legislature to provide as to

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\*Judge Cook was the only judge sitting at the hearing of this case.

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what shall constitute *prima facie* evidence that the election under this law was legally held.

7. The disposition to be made of fines imposed has always been provided for by the General Assembly, as was done in connection with the Beal Law, and is a matter of no concern to one charged with violation of that law.

COOK, J.

In habeas corpus.

The objection made to the detention of plaintiff by the sheriff of Guernsey county is that the court has no jurisdiction for the reason that the act of the General Assembly by favor of which the affidavit was made is unconstitutional and that it is too indefinite and vague to be enforced. The act was passed April 3, 1902 (95 O. L., 87), and purports to take effect from the date of its passage and is known as the Beal Municipal Local Option Law.

A large number of objections are made by plaintiff: That it contravenes Section 26, Article II of the Constitution; that it contravenes Section 1, Article II; that it contravenes Section 18, Article I; that it contravenes Section 10, Article I; that it contravenes Sections 1 and 2 of the Bill of Rights; that the word "wholesale" is indefinite and vague; that the fines are improperly disposed of; and other objections that will be noted.

The questions made principally respect the Constitution of our own state and must therefore be considered and determined in the light of the decisions of our own state, and but little assistance can be derived from the decisions of other states, as the Constitutions of the different states differ very materially in their provisions upon the questions involved.

The first two objections may be considered together. Section 26, Article II, provides:

"All laws of a general nature shall have a uniform operation throughout the state; nor shall any act, except such as relate to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this Constitution."

Section 1, Article II, provides:

"The legislative power of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."

Sections 4364-20a and 4364-20b, Revised Statutes (95 O. L., 87), are the sections of the Beal Law in controversy and provide as follows:

“Section 4364-20a. That whenever forty per cent. of the qualified electors of any municipal corporation shall petition council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held in not less than twenty nor more than thirty days from the filing of such petition with the mayor of the municipal corporation or from the presentation of such petition to said council, which said petition shall be filed as a public document with the clerk of the municipality, and preserved for reference and inspection and which election shall be held at the usual place or places for holding municipal elections, and notice shall be given and the election conducted in all respects as provided by law for the election of members of the council of the corporation, so far as said law may be applicable. The result of such election shall forthwith be entered upon the record of the proceedings of the council of the corporation by the clerk thereof, and in all trials for violation of this act, the original entry of the record, or a copy thereof certified by the clerk of the corporation; provided that said record shows that a majority of the votes cast at said election was against the sale of intoxicating liquors as a beverage, shall be *prima facie* evidence that the selling, furnishing or giving away of intoxicating liquors as a beverage or the keeping of a place where such liquors are sold, kept for sale, given away or furnished, if such selling, furnishing or giving away or keeping such place occurred after thirty days from the day of holding the election, was then and there prohibited and unlawful.

“Section 4364-20b. And if a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding said election it shall be unlawful for any person, personally or by agent, within the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished, for beverage purposes, and whoever from and after the thirty days aforesaid in any manner directly or indirectly, sells, furnishes, or gives away, or otherwise deals in any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, either permanent or transient for such selling, furnishing or giving away or in which or from which intoxicating liquors are sold, given away

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or furnished, or otherwise dealt in as aforesaid, shall be guilty of a misdemeanor, and shall on conviction thereof be fined not more than two hundred dollars nor less than fifty dollars for the first offense, and shall for the second offense be fined not more than five hundred dollars nor less than one hundred dollars, and for any subsequent offense be fined not less than two hundred dollars and be imprisoned not more than sixty days and not less than ten days. But nothing contained in any of the sections of this act shall in any manner affect the right of any manufacturer of intoxicating liquors from the raw material, to sell, deliver, and furnish his product in wholesale quantities to *bona fide* retail dealers trafficking in intoxicating liquors or in wholesale quantities to any party or parties residing outside the limits of said municipality."

Section 3 of the act provides:

"This act shall take effect and be in force from and after its passage."

It is fortunate that these provisions of the Constitution have been before the Supreme Court regarding legislation of a similar character, and from these decisions we are furnished with much light, if indeed the questions are not authoritatively settled. In *Gordon v. State*, 46 Ohio St., 607, the Supreme Court had before it what is known as the township local option law passed March 3, 1888 (85 O. L., 55).

Sections 1 and 2 of that act, which are Sections 4364-24 and 4364-25, Revised Statutes, provide as follows:

"Whenever one-fourth of the qualified electors of any township, residing outside of any municipal incorporation, shall petition the trustees thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such township and without the limits of any such municipal corporation, such trustees shall order a special election for the purpose, to be held at the usual place or places for holding township elections; and notice shall be given and the election conducted in all respects as provided by law for the election of township trustees; and only those electors shall be entitled to vote at such election who reside within the township and without the limits of any such municipal incorporation. A record of the result of such election shall be kept by the township clerk in the record of the proceedings of township trustees; and in all trials for violation of this act, the original entry of said record, or a copy thereof certified by

the township clerk, provided that it shows or states that a majority was against the sale, shall be *prima facie* evidence that the selling, furnishing, giving away, or keeping a place, if it took place from and after thirty days from the day of the holding of said election, was then and there prohibited and unlawful.

"Persons voting at any election held under the provisions of this act, who are opposed to the sale of intoxicating liquors as a beverage shall have written or printed on their ballots 'Against the sale;' and those who favor the sale of such liquors shall have written or printed on their ballots 'For the sale;' and if a majority of the votes cast at such election shall be 'Against the sale,' then from and after thirty days from the day of the holding of said election, it shall be unlawful for any person within the limits of such township and without the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished; and whoever sells, furnishes or gives away any intoxicating liquors as a beverage, or keeps a place where such liquors are kept for sale, given away or furnished, shall be fined not more than five hundred dollars, nor less than fifty dollars, and imprisoned in the county jail not exceeding six months; but nothing in this section shall be construed so as to prevent the manufacture and sale of cider, or sale of wine manufactured from the pure juice of the grape, cultivated in this state, nor to prevent (a) legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes; but this provision shall not be construed to authorize the keeping of a place where wine, cider or other intoxicating liquors are sold, kept for sale, furnished or given away as a beverage."

Section 8 of this act provides, "This act shall take effect and be in force from and after its passage," the same as the Beal Law.

It is difficult to make any distinction between this law and the one under consideration other than that law refers to townships outside of municipal corporations while the Beal Law affects all municipal corporations of the state. In *Gordon v. State*, 46 Ohio St., 607, and *State v. Rouch*, 47 Ohio St., 478, the Supreme Court in the syllabus, which is the law of the cases and by which we must be controlled, held:

"The act entitled, 'An act to further provide against the evils resulting from the traffic in intoxicating liquors by local option



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in any township in the state of Ohio,' passed March 3, 1888, is not in conflict with the Constitution and is a valid law."

In those cases the precise questions made in this case and which we are now considering were submitted and determined and must be conclusive unless such distinctions in the two laws can be drawn as to make these decisions inapplicable. It is claimed in argument that there is a distinction between the act of March 3, 1888 (85 O. L., 55), and the one under consideration in this case, that municipal corporations differ from townships proper; and, further, that the question counsel makes in this case was not presented in those cases, to-wit, that in order to make a law of a general nature have a uniform operation throughout the state it must operate upon all the people in the state and all the territory of the state. To use the language of one of the counsel in his argument, "it must act upon every person and every mile, acre and foot of the territory alike."

It is true that here is a distinction between townships and municipalities, especially in their government; townships are governed ordinarily by laws emanating directly from the General Assembly, while municipalities are governed ordinarily by laws or ordinances made by the law-making power of the municipality, authorized by the General Assembly. But certainly what the General Assembly could authorize a municipality to do, it could do itself. It would be a strange anomaly that the agent could act by the authority of the principal and yet the principal could not act directly in the same manner in its own behalf.

By Section 6, Article XIII of the Constitution, it is provided:

"The General Assembly shall provide for the organization of cities and incorporated villages by general laws."

In *State v. Hawkins*, 44 Ohio St., 98, 110, Minshall, J., in the opinion, says:

"The organization and government of cities is left, by the Constitution, to the General Assembly, with the requirement (Article XIII, Section 6) that it shall, by general laws, provide therefor; and the entire system of municipal government in this state has, in the exercise of this power, been created by the Legislature."

Under this provision the General Assembly has at different times enacted laws providing that any municipal corporation

shall have full power to regulate, restrain and prohibit ale, beer and porter houses and other places where intoxicating liquors are sold at retail, and such laws have uniformly been held to be constitutional. *Burckholter v. McConnellsville*, 20 Ohio St., 308; *Madden v. Smeltz*, 2 C. C., 168.

In *Burckholter v. McConnellsville*, *supra*, in the second paragraph of the syllabus it is held:

"It is no ground of objection to the validity of such municipal ordinances, when clearly authorized, that state legislation has not extended a similar prohibition over all parts of the state. It is for the law-making power of the state to determine within the limitations of the Constitution, to what extent city or village councils shall be invested with the power of local legislation."

In the opinion Chief Justice Scott says:

"Morality, and good order, the public convenience and welfare, may require many regulations in crowded cities and towns, which the more sparsely settled portions of the country would find unnecessary."

In *Madden v. Smeltz*, *supra*, it is held in the third paragraph of the syllabus:

"That the statute authorizing the passage of such an ordinance is not in conflict with Article II, Section 26 of the Constitution of the state."

In the opinion Albaugh, J., says:

"It is also claimed that the act under which the ordinance was passed is inhibited by Article II, Section 26 of the Constitution which provides that 'all laws of a general nature shall have a uniform operation throughout the state.' Legislation upon the subject of regulating, restraining and prohibiting the sale of intoxicating liquors, has been held to be of a general nature, and should have a uniform operation throughout the state. Legislation upon the subject of regulating, restraining and prohibiting the sale of intoxicating liquors, has been held to be of a general nature, and should have a uniform operation throughout the state. The general authority conferred upon municipal corporations by this statute to regulate, restrain and prohibit the keeping of ale, beer and porter houses, and other places where intoxicating liquors are sold, etc., has a general application to all such corporations within the state, and there-

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fore does not partake of the local character that is restricted by this section of the Constitution."

It would therefore seem that if legislation upon the subject of intoxicating liquors may be distinguished as it respects the state at large and municipalities, that laws of general nature might have a uniform operation when applied to municipalities when they would not when applied to portions of the state outside of municipalities. Certainly no good reason can be assigned why laws of a general nature applicable to municipalities would not have a uniform operation when the same law would have a uniform operation when applied to townships outside of municipalities, and we must hold that *Gordon v. State, supra*, is applicable to the statute under consideration.

It is said that the question made by counsel in this case was not made in *Gordon v. State, supra*, to-wit, that to have a uniform operation throughout the state the law must apply to every person within the state and to every foot of territory of the state, whether within or without municipalities, and it is strenuously insisted by counsel that, if that question had been presented, the decision would have been against the constitutionality of the law. Counsel say that in this case, in the opinion rendered by Dickman, J., that wherever he speaks of the township he always refers to the whole township, using the language "any township," "every township." The provisions of the act are bounded only by the limits of the state," etc. And they infer from the language that it never entered into the mind of the learned judge that the act under consideration only pertained to that part of the different townships lying without the limits of municipal corporations. It would be strange indeed that all the learned counsel in the case, and all the judges deciding the case, should overlook this important element of the controversy, and especially is this so when the same act was again before the Supreme Court in *State v. Rouch*, 47 Ohio St., 478, in which Spear, J., says:

"In *Gordon v. State*, 46 Ohio St., 607, the township local option act was attacked as unconstitutional on the ground that the act is of a general nature, and has not a uniform operation throughout the state; also, that it is a delegation of powers to

the people. \* \* \* In all these respects the act was held by the court not to be obnoxious to the objection urged, and to be valid."

Is it necessary that legislation of a general nature, in order to have a uniform operation throughout the state, must affect every person within the state and every foot of territory within the state, as claimed by counsel? If so, very much of the important legislation of the state and specially upon the subject of intoxicating liquors would be swept from the statute of the state. Laws prohibiting the sale of intoxicating liquors within a certain distance of agricultural fairs, religious societies, children's homes, soldiers' homes, colleges, etc., would all be unconstitutional.

Do the words "uniform operation throughout the state" necessarily have such broad signification? Webster defines "throughout" primarily, "quite through;" "from one extremity to the other of." Certainly no such interpretation of the words as counsel has placed upon them has been entertained by our Supreme Court.

In *Heck v. State*, 44 Ohio St., 536, it was held:

"The clause, 'whoever sells intoxicating liquors within two miles of the place where an agricultural fair is being held \* \* \* shall be fined,' etc., contained in Sec. 6946, Rev. Stat., as amended May 2, 1885 (82 O. L., 222), includes sales made by one whose place of business is permanently located within such distance, and is not in conflict with any provision of the Constitution, and is a valid law."

In the opinion, Minshall, J., says:

"It is also argued that the law is not uniform in its operation because it applies to the liquor dealer whose place of business is just within, and does not apply to the one that is just without the prescribed limit, and is, therefore, in conflict with Section 26, Article II of the Constitution. Is this tenable? Laws made applicable to cities and villages of a certain grade and class have been sustained time and again by the court, although they do not apply to those of another grade and class. A law is general and uniform that applies to all persons and things coming within its provisions throughout the state. Its uniformity consists in the fact that no person or thing, of the

description of any person or thing affected by it, except from its operation.

“The language of this law is general, and applies with uniformity to every person engaged in the business of selling intoxicating liquors within two miles of any place where an agricultural fair is being held.”

In *Gordon v. State*, *supra*, Dickman, J., uses this language:

“By the Municipal Code of May 7, 1869, Section 199, it was declared that all cities and corporated villages should, among other things, have the power, and might provide by ordinance for the exercise of such power ‘To regulate, restrain and prohibit ale, beer and porter houses or shops; and houses and places of notorious or habitual resort for tippling or intemperance.’ The uniformity in the operation of this law of general nature was not measured and fixed by the number of cities and incorporated villages that might exercise the granted power. One or many might, like the village of McConnellsville, pass the needful ordinances, but the provision of the code was none the less uniform operation throughout the state. The feature of uniformity in the local option law under consideration would no more be marred because the qualified electors of the townships generally fail to adopt its provisions, than the above enactment of the Municipal Code would have ceased to operate uniformly, because cities and incorporated villages did not generally pass ordinances to prohibit ale, beer and porter houses.”

In *Senior v. Ratterman*, 44 Ohio St., 661, 678, Spear, J., uses this language:

“Nor is the proposition tenable that the law being of a general nature is not of uniform operation throughout the state, and for that reason repugnant to Section 26 of Article II of the Constitution. True, the law is of a general nature and does discriminate between the general dealer and the manufacturer. It requires the one to pay, and the other, where the sales are of one gallon and over, is exempted. This implies a division of the two into separate classes, but does not show that because of that fact the law is not of uniform operation. The principal of uniform operation requires simply that the law shall bear equally in its burden upon persons standing in the same category. A law is uniform in its operation where every person who is brought within the relation and circumstances provided for is alike affected by the law. It must have a uniform oper-

ation upon all those included within the class upon which it purports to operate. It is not claimed that the law does not purport to operate equally upon all wholesale dealers who are not manufacturers. As between the wholesale dealer and the manufacturer there is manifestly a real tangible difference, though they have characteristics in common. The General Assembly has chosen to classify and to discriminate accordingly. If the classification is proper the discrimination can not be objected to. We are not prepared to say that the classification is not warranted."

There is no doubt but what the Supreme Court has somewhat receded from its previous opinions as to what legislation comes within Section 26, Article II of the Constitution and will eventually hold, if it has not already practically held, that legislation only affecting grades and classes of cities and villages is prohibited by Section 26, Article II. Yet it is doubtful if the pendulum will swing so far back as to make legislation of the character in controversy, applying to all municipalities, unconstitutional under that article and section; certainly it has not yet done so and it would be presumptuous for a judge of a lower court to assume that it will do so.

As to the referendum clause of the act, which provides that an election shall be held and the qualified electors determine when the law should be enforced, it is sufficient to say that question was fully considered and determined in *Gordon v. State*, *supra*, that clause being the same in both acts. Dickman, J., in the opinion, says, p. 630:

"But it is further contended that the act is a delegation of legislative power to the people, and therefore in contravention of Section 1, Article II of the Constitution. That section provides that the legislative power of the state shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives. It is a general rule that the agent whose employment and trust are personal, can not, without express and implied authority from his principal, delegate his power. And it is a settled maxim that when the people, in their sovereign capacity, have by the Constitution conferred the law-making power upon the Legislature, that department can not delegate such power to any other body. The power must remain where located, and laws must be enacted through the established agency, until there is a change in the Constitu-

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tion itself. Yet, while the principle may be universally recognized, that the Legislature can not evade its constitutional trust as the law-making agent, difficulty may arise in determining, whether by any special act the Legislature has, directly or indirectly, sought to divest itself of its constitutional authority and obligation. The natural tendency of the legislative department is to encroachment, and we may well be inclined in the first instance to question whether it has relinquished any portion of its power.

“In the exercise of the duties devolved upon the legislative branch of the state government, it is manifest that discretion and judgment are required, not only in determining the subject matter of legislation, but not unfrequently in ordering the conditions or contingencies upon which laws are to be carried into effect. It may be deemed expedient in one case to provide for preliminary action before a law is executed, which under other circumstances would not be adopted. In requiring such proceedings prior to the enforcement of a law, the Legislature need not be prevented from keeping within the strict line of its authority.

“It is evident, we think, that the act whose constitutional validity is called in question was a complete law when it passed through the several stages of legislative enactment, and derived none of its validity from a vote of the people. In all its parts it is an expression of the will of the Legislature, and its execution is made dependent upon a condition prescribed by the legislative department of the state. By its terms it was made to take effect from and after its passage. The qualified electors derived their authority to petition the trustees, and the trustees obtained their authority to order a special election directly from the Legislature. The right of the electors to register their votes for or against the sale of intoxicating liquors is conferred by the same body. If a majority of the votes cast at such election should be against the sale, the traffic in intoxicating liquors is thereby prohibited and made unlawful, by virtue of the act of the General Assembly, which may at once, if a change should come over the legislative will, repeal the law and avoid the result of the election. So far from the vote of the electors breathing life into the statute, it is only through the statute that the electors are entitled to vote at the special election. While they are free to cast their votes, the consequence of their aggregate vote is fixed and declared by that act of the Legislature. The penal sanction of the act is subject to no modification by the action of the electors, and it is an elementary principle that ‘the main strength and force of a

law consists in the penalty annexed to it. Herein is found the principal obligation of human laws' (1 Black Com., 57). In some of the authorities which we have examined the idea is prominent, that when the voters are called on to express by their ballots their opinion as to the subject matter of the law, they declare no consequence, prescribe no penalties and exercise no legislative functions. The consequences, it is said, are declared in the law, and are exclusively the result of the legislative will."

The citation of these authorities conclusively show that counsel for plaintiff are wrong in their first two objections to the constitutionality of the law which constitute their main contention.

There are several other objections that should be noticed. It is claimed that this law contravenes Section 18, Article I of the Constitution, in the provision that at any time after two years another election may be held, and if a majority decide in favor of the sale of intoxicating liquors, then the law is suspended; and this provision of the Constitution is violated which provides that "no power of suspending laws shall ever be exercised except by the General Assembly."

Not so. The law is in no manner suspended; it still continues in full force. As we have seen, it was in full force and effect after its passage before any election was held. The election simply provided for its enforcement. And the second election is the mere expression of the opinion of the electors that they do not longer desire it to be enforced. If the law went into effect immediately after its passage and before the first election, as was decided in *Gordon v. State* and *Santoro v. State*, *supra*, certainly the second election would not suspend the law.

While this distinct question was not passed upon in *Gordon v. State*, *supra*, a similar question was presented. Messrs. Ferguson, Johnson and Retallic, in their brief, make one of the grounds of objection to the constitutionality of the law "that it authorizes the people to suspend or repeal a law, to-wit, the Dow Law." The judge in his opinion did not refer to this question. Possibly he considered it not of sufficient importance.



It is also said it contravenes Section 11, Article III, in this, that it grants unto the people the pardoning power by permitting a second election. The result of the second election, although it might be in favor of "the sale," would not absolve from any offense previously committed when the sale is prohibited.

Again, it is claimed that the law is in violation of Section 10, Article I of the Constitution in this, that it does not afford the party accused the right to have "a trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The theory of counsel is that in a case of this character the jury should only be selected from the municipality where the law is violated, while the law permits the jurors to be selected from the body of the county within and without the municipality. It is true the offense can only be committed within the municipality; nevertheless it is committed within the county, and the jury is selected from the county. It is a little difficult to see how it differs from any other offense committed in the county. If the party was charged with larceny committed within the municipality, he could be tried by a jury impaneled from the body of the county. Simply because this offense can only be committed within the municipality could make no difference. No authority is referred to. Many persons have been convicted for selling liquors within the prescribed limits of agricultural fairs, colleges, etc.; also for violation of the township local option act, and this question does not seem to have been before raised; and the practice having been so long continued without objection, raises a strong presumption of the validity of the law.

It is claimed that the law violates Sections 1 and 2 of the Bill of Rights and the Fourteenth Amendment of the Federal Constitution in this, that it discriminates between parties living within and without municipalities and between manufacturers and dealers.

As a general proposition all the people of the state should have the same rights and privileges and be subject to the same burdens and penalties; but the subject matter of legislation must be considered. When Lord Palmerston was home secretary

under Lord John Russell, he proposed to the ministry that a bill should be introduced in parliament repealing all laws discriminating against the sale of malt liquors. He insisted that he could see no reason under the law how its sale could be legally restricted any more than that of molasses. The premier answered, "My lord, the reason is apparent. One is beer and the other treacle," and declared that such a bill could not receive the support of the government as then constituted. It has been determined again and again by our Supreme Court that the General Assembly might prohibit the traffic in intoxicating liquors entirely. It is said by McIlvaine, J., in *State v. Frame*, 39 Ohio St., 399:

"If, in the judgment of the General Assembly, it be necessary, in order to prevent evils resulting from the traffic, that the sale and use of intoxicating liquors as a beverage be absolutely prohibited, we can see no constitutional ground upon which such exercise of its judgment and discretion can be reviewed."

If it can be prohibited, it can be restricted, and the place, amount and manner of sale may be determined. If, in the judgment of the General Assembly, the traffic should not continue within municipalities, then it may discontinue it, and no one within the municipality must engage in the traffic. If, in the judgment of the General Assembly, the manufacturer may engage in the traffic under certain restrictions, by selling in quantities and to persons described in the act, and all persons not manufacturers may not do so, then it may so determine (*Senior v. Ratterman, supra*). It is a question for its judgment and discretion to determine under Section 18 of the schedule to the Constitution what are the best means to provide against the evils resulting from the traffic. Upon this theory are all the laws we have now and ever had relating to the subject, much of which legislation has already been referred to. Certainly no one can complain that he is discriminated against by not being permitted to engage in the traffic which the organic law of the state recognizes as an evil and which the highest court of the state has declared may be prohibited altogether.

As said in *Gordon v. State, supra*, so often referred to:

“When the General Assembly was clothed with authority by the Constitution to provide by law against the evils resulting from the traffic in intoxicating liquors, it was left to its discretion—subject to such express limitations as the Constitution imposed—to select the means whereby the evils might be avoided. The Legislature, in the plenitude of its discretion, having determined upon the methods of providing against such resulting evils, it would not be for the judicial branch of the state government to interfere.”

It is again claimed that the statute is so defective in its provision that it can not be properly executed, and therefore has no validity in law. This claim is founded upon the clause which provides that the manufacturer may sell in wholesale quantities. The inquiry is made, what is a wholesale quantity? How shall it be averred in the indictment and who shall determine it, the court or the jury? This objection might be disposed of by saying that plaintiff has no interest in the determination of this question, he not being charged as a manufacturer selling at wholesale, and therefore no concern of his (*Van Wert v. Brown*, 47 Ohio St., 477). An act, though not clear and definite, though vague and uncertain as to its method of enforcement, may nevertheless be valid. It will not be declared void because it is difficult of execution. A law may be imperfect in its details, yet it is not void unless it is so imperfect as to render it impossible to execute it. *Cochran v. Loring*, 17 Ohio, 409, 427; *Gordon v. State, supra*.

Tested by these rules, is the act void upon this ground? Many acts of the General Assembly have provisions that are not clear and definite and have only been made so by judicial determination. This applies to criminal as well as to civil acts. In the act defining burglary, what is night season? What is it to forcibly break and enter; what is other building? These words have been made clear by judicial determination. Many similar cases might be cited. The word “wholesale” is not a word of difficult interpretation, and the court would have no trouble in determining its meaning. It may have a definite and determinate signification, as used in this act, and needs no interpretation. In *State v. Rouch, supra*, it was held that the local

option act and Dow Law should be construed together and as a part of the same general subject, and, where necessary to a clear understanding of either, are to be construed together. The Dow Law fixes the quantity which a manufacturer may sell, at one gallon or more, and such no doubt was the intention of the General Assembly in the use of the word "wholesale" in this act.

Objection is also made that the law provides as to what shall constitute *prima facie* evidence of the fact that the election was legally held. It is certainly within the power of the General Assembly to provide as to the quantum of proof necessary and as to what shall constitute proper evidence. The proceeding in courts, criminal and civil, in all its stages, is the subject of legislation, and is controlled only by the inhibition of the Constitution, and we know of no provision of the Constitution which prohibits the General Assembly from determining what shall be sufficient evidence *prima facie* or conclusive in actions subsequently arising.

Objection is also made to the section making disposition of fines collected. That also is a matter of no concern to plaintiff. What difference is it to him whether the fine, if one is assessed against him, be paid into the county or municipal treasury? This section provides, as we understand it, that when the fine is imposed by a magistrate within the municipality where the traffic is prohibited, it shall be paid into the municipal treasury. Disposition of fines has always been provided for by the General Assembly. Sometimes they are paid into one fund, sometimes into another, and sometimes a part or even a whole is ordered paid to an informer. Section 6802, Revised Statutes, provides that all fines shall be paid "into the treasury of the county in which such fine was assessed" "unless otherwise required by law. This act requires that under certain circumstances the fines shall be paid into the municipal treasury.

As before stated, a large number of objections have been made by distinguished counsel on both sides, all of which we believe have been referred to; justice to counsel seemed to require that. On both sides the arguments and briefs show that a great amount of labor has been bestowed upon the case, and we have received

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invaluable assistance from the arguments and briefs. The conclusion to which we have arrived we consider the only one to which we could come. With the propriety or wisdom of the law we have nothing to do. From the decisions of our Supreme Court, as they now are, the law must be held to be constitutional. We should add, as stated by Chief Justice Marshall, "that a law should not be declared unconstitutional without a clear and strong conviction of the incompatibility of the Constitution and the law." This would particularly apply to an inferior court, and more especially where but one judge of that court passes upon its constitutionality. The plaintiff will be remanded to defendant, sheriff of Guernsey county.

*R. M. Nevin, F. S. Monnett and James Joyce, for petitioner.*

*W. B. Wheeler and A. L. Stevens, for respondent.*

### JUSTIFICATION FOR AN ARREST.

[Circuit Court of Lucas County.]

HENRY C. EHLERT v. WILLIAM GOMMOLL.

Decided, June 20, 1902.

*Malicious Prosecution—Advice of Counsel—A Complete Defense Against—Should be Pleaded as a Defense.*

1. Where one causing an arrest proceeds in good faith upon the advice of one learned in the law, and especially where the advice is by a judge having responsibilities in the premises, and no facts appear which were not brought to the attention of the one giving the advice, such advice is a complete defense in an action for malicious prosecution based upon the arrest.
2. It is the proper practice that such advice be pleaded as an affirmative defense, but the omission to plead it is immaterial, where the evidence was introduced without objection, and the court charged with reference thereto and the jury acted upon it.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

In the court below this was a civil action for damages on account of alleged malicious prosecution, the plaintiff below being

William Gommoll and the defendant below being Henry A. C. Eihlert. The trial resulted in a verdict in favor of the plaintiff below for about \$400. Motion for a new trial was made upon various grounds, which was overruled, and judgment was entered upon the verdict. Defendant below prosecutes error and insists that the verdict is against the weight of the evidence. He also contends that there was error upon the trial in the admission and rejection of evidence and in the charge of the court and in the refusal of the court to charge certain propositions. I will say, in passing, that we do not find in the bill of exceptions any requests to charge, either before or after argument, which were refused by the court.

The history of the matter out of which this suit develops, briefly stated, is this: The father of William Gommoll was the father of a number of small children. Complaint was made in the probate court of this county of his treatment of his small children; that he was cruel; and as the result of a proceeding in that court, Henry A. C. Eihlert was appointed guardian of these children. It appears that the hearing, or at some hearing in that court, the father being desirous to take the children home and not be deprived of their custody by the guardian, and the son, William Gommoll, also desiring that this might be accomplished, William promised the guardian and the court that if his father might be permitted to take the children home and have their custody, he would undertake to see to it that they were well and properly treated; and in pursuance of that promise and arrangement, the father was permitted to retain the custody of his children. Subsequently other complaints were made, which came to the attention of the guardian, of further cruelty on the part of the father toward the children, whereupon the guardian, Eihlert, went to the residence of the father and undertook to possess himself of the children. His application for the children was denied by the father, and the efforts that he and the officer made to obtain the custody of the children were resisted by the father, although the parties did not come to any actual conflict, and he was obliged to go away without the children and resort to other measures to obtain possession of them.

On this occasion the son, William Gommell, was present, and his attitude towards the parties was such as to make Mr. Ehlert feel that he was aiding, abetting, encouraging and sustaining his father in his resistance to the application of Mr. Ehlert for the custody of the children. Of their conduct on these occasions, Mr. Ehlert made complaint to Probate Judge Millard; and he contends and testifies that he truthfully and fully stated all of the facts of these incidents to Judge Millard, and appealed to him for advice as to how he should proceed, and he testifies that he was advised by Judge Millard—who, it appears, was a reputable lawyer and who had been long in the practice of law before he became probate judge—to have these parties arrested as well as to take proper measures to obtain the custody of the children. He testifies that, proceeding upon this advice, which he regarded as valuable and safe, he filed an affidavit in one of the city courts, the affidavit being drawn by the clerk of that court, charging the father and son with having secreted these children and kept them from the custody of their lawful guardian, in violation of a penal statute.

It appears that the father and son were arrested upon this charge and were imprisoned and kept some time in custody, and the final result of the prosecution was that they were discharged; whereupon William Gommoll, the son, began this suit against Mr. Ehlert, charging him with having prosecuted him maliciously and without probable cause, and asking for damages.

I have spoken particularly of the incident of Mr. Ehlert going to Judge Millard for counsel, for upon that turns one of the important questions in this case. In his testimony, at page 82 of the record, Mr. Ehlert testifies, after relating the incident of going to the house and trying to obtain custody of the children, and after relating that he had come back to the office of Judge Millard, as follows:

“And when I seen, or we seen we could not get possession of the children, I went back and told Judge Millard that the children, my wards, had been mistreated and abused, and that I had went out and asked both the old man and his son William to give me the children, and that they had refused to do so, and I asked him \* \* \* I told him I heard the old man hid the

girl. \* \* \* I told the judge at that time, of course, that he had locked the door and would not let me have the children. And Judge Millard informed me, and, by the way, I know him as a good attorney and high standing, and he has been probate judge of this county for many years, I asked him for his valuable advice, what to do in the case; he said to me, 'Why, have them arrested, first; then go and get the children.' "

Farther along he testifies more fully as to the information he gave to Judge Millard, and he testifies in substance that he informed him fully as to all the facts and that he received this advice—really, as he states it, received this instruction—this direction—from Judge Millard as to his duties and about how he ought to proceed, as to what he was justified in doing and what he was bound in duty to do.

Judge Millard was called as a witness by the plaintiff below, and although, to some categorical questions, he answered that he did not so advise, yet the form of the questions were such that the judge might well so testify, and yet his testimony might be entirely consistent with that of the defendant below upon this point; and upon the full examination of Judge Millard, taking the substance of all his testimony, both direct and by the way of cross-examination, it can not be said fairly that he denied having given such advice in this transaction, though as to the precise fact of advising it he says that his recollection is very much at fault, at least that it is not clear or certain.

As the testimony stood, however, certain questions of fact were to be submitted to the jury, *i. e.*, whether the defendant below—the plaintiff in error—had gone to Judge Millard in good faith to find out what he might do, or what he ought to do in the premises; whether he had truthfully and fairly stated all the facts to Judge Millard; whether he had received this advice from Judge Millard, and whether he had proceeded upon the faith of it.

And because of that issue a question of law is involved here, *i. e.*, what instruction should have been given to the jury by the trial judge as to their duty in the premises in the event that they should find that the story of the defendant below in this respect was true. Upon that point the trial judge charged the jury as follows:



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“Mr. Eihlert brings into this case a proper fact and submits it to the consideration of the jury. And that is his conduct relative to his having consulted Judge Millard in regard to this matter. It is the law that if a man, before he has a warrant issued for the arrest of another, goes to a lawyer, some one learned in the law, and lays before him all the facts and takes his advice as to whether the man has been guilty of a crime that he describes or not, that fact may be considered by the jury, and is held by some courts to be a complete defense; by others, not; but it may be considered by the jury as tending to show that he has reasonable and probable cause upon which to act, and as tending to rebut any malice that may have been alleged and attempted to be proven in the case. A man is not authorized to consult an attorney and withhold from him the real facts, or distort the facts, or tell him part of the facts, then secure his advice and act upon it, and then undertake to shield himself behind that. In order to protect himself by consulting an attorney or any one learned in the law, it is his duty to make known to the party that he consults all the facts in the case, in order that he may advise him correctly, because he may not advise him correctly if he does not know all the facts. So it is a question in this case for the jury to consider what Mr. Eihlert did with reference to consulting Judge Millard, and to what extent he disclosed the facts to Judge Millard; to what extent he was advised by Judge Millard to do as he did in the case.”

Now it will be observed that while the trial judge stated to the jury that it is the law in some jurisdictions—the law as laid down by some courts—that these facts testified to by plaintiff in error would be a complete defense, he proceeds to lay down as the law of this case, in effect, that it is not a complete defense, but that “it may be considered by the jury as tending to show that he has reasonable and probable cause upon which to act and as tending to rebut any malice that may have been alleged and attempted to be proven in this case.”

And that is all the construction he authorizes the jury to give to these facts, if they find them to be as stated by the defendant below.

In this we think the learned judge was in error. We think it is the law of this state that where it is shown that the prosecutor in good faith sought, obtained and proceeded upon the faith of the advice of counsel learned in the law, especially

where such counsel is a judge of a court having certain responsibilities and certain duties in the premises, without any additional facts having been brought to his attention after he had received the advice that would tend to qualify it, or qualify the facts upon which the advice was given, such advice is a complete justification; that it is a complete defense; that it is not merely evidence to be considered by the jury as tending to show that he had reasonable and probable cause upon which to act and as tending to rebut any malice that may have been alleged or shown in the case.

Some authorities on this question are collected in 4 Wait Act. and Def., 354, 355, and I will read a part of these:

“The defendant may also rebut the presumption of malice by showing that he acted under the advice of counsel. If the defendant communicated to counsel all the facts bearing upon the guilt or innocence of the accused of which he had knowledge, or could by reasonable diligence have ascertained, and, acting under the advice of such counsel, procures the accused to be indicted, he may plead the advice thus given as a defense in an action for malicious prosecution.”

To this there are quite a large number of authorities cited.

“The fact that the defendant sought, received and acted upon the advice of counsel affords strong evidence that there was probable cause and that the prosecution was entered into in good faith and without malice.

“While an honest reliance on the advice of counsel, who has been fully informed of the facts, may be a complete justification in an action for malicious prosecution, the advice of a lawyer who is a pettifogger will be no justification. \* \* \* And a reliance upon the advice of a person who is not a counselor or attorney at law is incompetent to disprove malice.”

And more to the same effect. Now it is true, as stated by the judge in the court below, that in some jurisdictions it is held that the advice of counsel goes no farther towards protection of a defendant in a case of this character than is stated in the rule laid down by the judge in his charge to the jury. It is said in the same book, at page 355:

“Under the Georgia code the advice of counsel is not in itself a protection to the defendant in this action; yet evidence of the

fact may be submitted to the jury as a circumstance tending to show a want of malice, the existence of probable cause and a mitigation of damages."

And that is the rule in some other jurisdictions. It is important, of course, to inquire what the law is in Ohio upon the subject, and to that end we will call attention to certain decisions, most of which have been cited by counsel upon one side or the other in the hearing of this case.

The first is *Ash v. Marlow*, 20 Ohio, 119. This does not give much assistance upon the precise point involved here. The fourth clause of the syllabus reads:

"If the defendant, in an action for malicious prosecution, would take shelter under the 'advice of counsel,' he must be prepared to show that he communicated to such counsel all the facts bearing upon the guilt or innocence of the accused of which he had knowledge or by reasonable diligence could have ascertained."

The effect of such advice is not stated; that question was not involved there.

In *White v. Tucker*, 16 Ohio St., 468, the second section of the syllabus is as follows:

"On the trial of such action the defendant may prove, as a part of the transaction complained of, tending to rebut malice and to mitigate damages, that, at the time he made the complaint against the plaintiff, he stated to the magistrate all the facts upon which it was based, and that, upon his assurance that such facts constituted the crime charged in the affidavit, he instituted the prosecution in question."

There the facts were not stated to nor the advice given by an attorney at law, but the advice was given by a magistrate, and the extent of protection afforded by the advice of a magistrate is laid down in that case. Reading from the opinion by Judge Day, at page 470, we find this:

"As to the first proposition, it may be remarked that, although the evidence might be admissible, conformably to the general principle that the defendant may prove that he proceeded in good faith, upon the advice of counsel, thereby showing probable cause, still upon the question of malice and of the mitigation of damages it was pertinent and relevant."

Showing that the Supreme Court at that time and in that case recognized the distinction, the wide difference between the stating of facts to a magistrate and proceeding upon his advice, and the stating of facts to a counselor at law and proceeding upon his advice, and that the court recognized the "general principle" that "the defendant may prove that he proceeded in good faith, upon the advice of counsel, thereby showing probable cause."

In *Lamprecht v. Crane*, 4 Bull., 1107, we find a *per curiam*, by the Supreme Court in an unreported case, consisting of seven different propositions. I read the sixth, as introductory to the seventh, and the seventh is applicable here:

"6. And for prosecuting such proceeding in such court, maliciously and without probable cause, an action for malicious prosecution will lie.

"7. Where a prosecution is sought to be justified on the ground of advice of counsel, it is incumbent on the prosecutor to show that all the facts material to the prosecution known to him, or which might have been ascertained by reasonable diligence, were communicated to counsel."

A negative recognition of the rule.

In *Nigh v. Keifer*, 5 C. C., 1, the court being composed of Judges Shauck, Shearer and Stewart, of the second circuit, the opinion of Judge Shearer cites with approval and as being in harmony with the law of Ohio, certain decisions of other states bearing upon the case. I read from his opinion at page 3:

"The court below assumed that a full and fair statement had been made in good faith, and that the advice received thereon had been acted upon in good faith; and that all that was testified by Keifer and his attorney in that behalf was true. There, we think, the court below made a mistake.

"The jury, under the rule in Ohio, had the right and the exclusive right to pass upon the credibility of Keifer and his attorney. They had the right, also, to say whether Keifer was actuated by proper motives, and acted in good faith.

"In *Ames v. Snider*, 69 Ill., 376, it was held: 'That where a party consults with competent legal counsel, *in good faith*, to ascertain what course to pursue in reference to acts done by another, and such counsel, after proper deliberation and examination into the facts, advises an arrest for a criminal offense, the

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party causing the arrest shall not be held to respond in damages for this action, notwithstanding it may appear on the trial the party accused was not guilty. But the advice must be sought *in good faith*, and the party must make a full and honest statement of the facts to counsel.' To the same effect are *Wicker v. Hotchkiss*, 62 Ill., 107, and 43 Ind., 78. This, we think, is a fair statement of the rule, and not in conflict with *Ash v. Marlow*, 20 Ohio, 119. In that case it is said that 'probable cause' is a mixed question of law and fact, and if the facts are contested, the court must leave them to the jury with instructions as to what is 'probable cause.'''

The error of the court in *Nigh v. Keifer*, *supra*, consisted in not submitting to the jury the questions whether the client had fully and fairly stated all the facts to his counsel and whether he had proceeded in good faith upon the advice of counsel. The court excluded those questions from the jury, but the decision, it will be observed, recognized the rule as we have stated it to be the true rule in Ohio.

We are cited by counsel to *Britton v. Granger*, 13 C. C., 281, where the real question was as to whether the statement had been made to counsel and the advice given by counsel, before or after the prosecution alleged to have been a malicious prosecution was instituted. In that case, a police officer finding a person in the commission of what he deemed to be a violation of a criminal law, arrested him on view. He then went to the prosecuting officer of the city of Cleveland, Judge Fielder, a duly licensed practitioner of the law, and stated the facts to him and asked for his advice, and upon his advice filed an affidavit charging the person he had arrested with the crime. Upon trial the person was found to be not guilty. Thereupon he instituted a suit for malicious prosecution against the police officer. The police officer undertook to interpose as a defense the advice he had received from counsel, and submitted a charge to the court, which we conceive did not go as far as he might have asked the court to charge; the charge was substantially that given by the learned judge in the court below in this case, but the court below refused to give it. He proceeded to charge that in a proper case, where the facts were perfectly stated to counsel, and the client proceeded on the advice of counsel

and his action is justified thereby, which we understand to be the law; but he charged further, that the arrest having been made before the advice was sought or given, that the rule had no application; that the prosecution was begun before the advice was sought or given, and that therefore this testimony as to having taken the advice of an attorney was only admissible upon the question of malice or good faith, and was not admissible as tending to establish a defense or justification; and with respect to that ruling the circuit court held that the common pleas court was in error; that the prosecution was not in fact begun until the affidavit was made and filed; that the filing of the affidavit was the beginning of the prosecution. So it will be seen that that case is not of much value to us in the case at bar.

On account of this error in the charge, which is certainly very material and prejudicial, the judgment will have to be reversed and the case remanded for a new trial.

It is true that in this case the matter of advice of counsel is not pleaded as a defense, but no objection was made to the introduction of evidence on that ground. The evidence was all heard, all considered, all submitted to the jury, and the court undertook to charge the law upon the question, and therefore the absence of the matter in the pleading was immaterial. We think, however, that it is the better practice, perhaps necessary in a case of this kind, if objection should be made to the introduction of the testimony, to plead the matter as an affirmative defense.

Various other matters occurred upon the trial that are complained of by counsel for plaintiff in error, one matter being that there was some evidence of the occupation and standing of the plaintiff below, tending to show that he was a man of fair reputation in the community in good standing. We see no error in that, notwithstanding it was in respect to a matter occurring after the alleged malicious prosecution. If, on the other hand, he had undertaken to show an impairment of reputation by reason of the malicious prosecution, we think that as well would have been admissible. Neither are we prepared to say that the verdict was against the weight of the evidence. We have very serious doubts as to whether this verdict is right, as

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to whether it is just, as to whether it is justifiable, but as the case must go back to be retried, we go no farther than to say that we entertain very serious doubts on that question; but it may appear differently if the case comes before us again. We find no other errors in the record; but solely on account of the error that we have pointed out in the charge, the judgment of the court will be reversed and the case remanded.

*James M. & W. F. Brown and Clem Wagner*, for plaintiff in error.

*Frank I. Isbell and F. M. Sala*, for defendant in error.

### STREET ASSESSMENTS.

[Circuit Court of Lucas County.]

**KATE HENDRICKSON ET AL V. CITY OF TOLEDO ET AL.**

Decided, November 1, 1901.

*Street—Appropriation of Land for Extension of—Validity of Award Made by Probate Judge without a Jury—City Acts as Trustee—Cost of Land Assessed Back upon the Property—Valid where Petitioners so Agreed—Burden of Proof as to Benefits.*

1. Where in accordance with a petition by abutting owners land is appropriated for the extension of a street, and the petitioners expressly agree that the cost shall be assessed back upon the property, the statute in connection with this agreement makes the assessment valid; and the abutter is bound by the contract, or is estopped from denying the validity of the assessment, or both, notwithstanding a doubt as to the power of a municipality to so assess back the cost or to enter into such an agreement.
2. In proceedings for the appropriation of property for street purposes, instituted in accordance with a petition by abutting owners, the municipality acts as a trustee for the property owners and should exercise good faith in preserving and protecting their rights.
3. Where in such proceedings a jury is waived, and the award is made by the probate judge, and both the municipality and the property owners are satisfied with the award, and there is no showing of collusion or unfairness, the award will not be set aside for irregularity.

4. Where property owners declare in a petition for a street improvement that they believe their property will be benefited thereby, and subsequently seek to enjoin the collection of the assessment on the ground that they were not specially benefited, the burden is upon them to show a failure of benefits, if indeed they are not estopped from claiming a failure of benefits.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This case is here on appeal. The action was brought to enjoin the collection of assessments made upon the lands of the plaintiffs on account of the expense of extending Colfax street, in the city of Toledo, the expense assessed being the cost of the lands acquired by the city for the extension of the street, i. e., the expense incident to the acquisition of these lands by appropriation proceedings.

Plaintiffs contend that this is an illegal assessment, relying upon the decision of *C., L. & N. R. R. Co. v. Cincinnati*, 62 Ohio St., 465, which overrules *Cleveland v. Wick*, 18 Ohio St., 303, and holds that so much of Section 2284, Revised Statutes, as provides for the assessment of this kind of expenses upon lands benefited is invalid.

Plaintiffs do not aver in their petition in this case that the improvement was not petitioned for by them or others in accordance with the requirements of Section 2267, Revised Statutes, which section requires that as a condition precedent to levying an assessment upon lands to be benefited, there shall be a petition signed by two-thirds of the owners of the lands to be charged. It is averred in the petition, however, that the assessment of this cost was not made by a jury, as provided by Chap. 3, Tit. 12, Div. 7, Revised Statutes, but that the city instituted an action for the appropriation of this property in the probate court, where a jury was waived, or was not called, and that by agreement or consent the value of the two pieces of land taken was fixed at \$1,500—\$600 to one proprietor and \$900 to another—and that thereupon judgment for the payment of this amount was entered.

It is said that this action was irregular, and rendered the proceedings invalid, so that even if there were no other objection, the assessment ought not to stand. The petition also avers that



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the lands or lots of the plaintiffs upon the street were not specially benefited by the improvement, and that therefore they could not be assessed.

The answer admits the averments of the petition as to the various steps taken by the common council in establishing this improvement, the opening up of this street, and the appropriation of the property for the improvement. It denies that the plaintiffs were not specially benefited; it denies in effect that there were any irregularities in the proceedings in the probate court; and it avers with respect to the petition for this improvement as follows:

“Further answering, these defendants say that prior to the time of the adoption of the resolution, the plaintiffs herein, or their grantors, filed a petition in writing with the common council of the city of Toledo, praying the said city of Toledo to enact the necessary legislation for the appropriation and condemnation of the property necessary for the extension of said Colfax street as aforesaid, and consented therein that an assessment might be made by the said city of Toledo upon the lands of said petitioners to defray the cost and expense, including all awards arising out of, or resulting from, the condemnation and appropriation of said property; that said parties so petitioning the said city of Toledo knew at the time of the filing of said petition with the common council of said city, that if said improvements were made, all of the property abutting upon said Colfax street when opened and extended, as petitioned for, would be assessed for the appropriation and condemnation of said property, in proportion to the special benefits conferred thereby; that the said city of Toledo enacted said legislation in pursuance of and in reliance upon said petition, and in reliance upon their right to assess the cost and expense occasioned thereby upon all the real estate bounding or abutting upon said Colfax street when so opened and extended as aforesaid; that these plaintiffs knew at the time of the filing of said petition with said common council that said property so bounding and abutting upon said Colfax street would be specially benefited by the making of said improvement over and above the general benefit that would result to the remainder of the said city of Toledo therefrom.”

These averments of the answer are denied by the reply; so that it will be observed that the issue as to whether the plaintiffs signed the petition for this improvement is raised by the answer and reply.

The evidence upon the issues as made by the pleadings has been submitted to this court. Plaintiffs contend that it does not appear from this evidence that they or their grantor petitioned for this improvement.

Exhibit 1 introduced in evidence, consists of two sheets, with a paper back, upon which back appear several endorsements. The first sheet is a petition which (omitting a part of the heading, which can not be made out on account of the way it is pinned in) reads as follows:

“To the Hon. The Common Council of the City of Toledo:

“*Gentlemen*—We, the undersigned, owners of the property described opposite our respective names, the same abutting on Colfax street and Colfax street extended, between Shaw avenue and Lawrence avenue as indicated, desiring that Colfax street may be opened and extended from the present terminus of said Colfax street at the west line of Shaw’s Monroe street addition to Lawrence avenue, and believing and acknowledging that our respective properties would be specially benefited thereby, respectfully petition your honorable body to cause the same to be so opened and extended, and that you pass the necessary legislation and cause proper appropriation proceedings to be had therefor, and we further request that a special assessment be made to pay the cost and expense thereof, upon the property abutting upon said Colfax street and Colfax street extended, between Shaw avenue and Lawrence avenue, and consent and request that our respective properties may be so assessed.

“Respectfully submitted.”

This is signed by twenty petitioners. Appended is a notation that there are twenty-nine land owners upon the street, and that there is a majority of five signing the petition. It is admitted that seven of the plaintiffs—Dale, Wilkinson, Miller, Hough, Van Hellen, Ott and Yearick—signed this petition, and it is also shown that the grantor of Emma C. Caldwell, who owned the property at the time this improvement was made, signed the petition. With respect to the other plaintiffs—Kate Hendrickson, Ada S. Long and Michael Murphy—there is no evidence tending to show that they or their grantors signed the petition; and it is conceded that the evidence shows that they did not.

The second sheet of this exhibit is a resolution in the ordinary form, declaring the intention of the city to open and extend

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Colfax street from Shaw avenue to Lawrence avenue, and that appears to have been adopted, according to the notation upon it, March 21, 1898. It is indorsed by a stamp by David McAllese, president of the board of councilmen, and J. Charles Meissner, president of the board of aldermen, and attested by Lem. P. Harris, city clerk. The backs of these two sheets contain various endorsements, to the effect that the resolution mentioned was adopted by the board of aldermen and the common council in 1898. There are also upon it notations indicating, as explained by the city clerk, who was a witness, that this paper had been referred to certain committees of the common council. The first sheet, viz., the petition, contains this endorsement:

“I, William A. Mills, City Solicitor of the City of Toledo, Ohio, hereby certify that I have examined the above and foregoing petition, and that I approve the same.

“WM. A. MILLS, *City Solicitor.*”

Originally that contained the additional words, “the 2d day of September, 1897,” but a pen was run through that part of it for some reason not explained.

The city clerk testifies that this paper, consisting of the various sheets, was found in the office of the city clerk by him, in the usual and proper place for petitions and resolutions, and that both of the papers have been duly recorded in the course of proceedings for the opening up of this street, in the respective volumes of records provided for the recording of such papers; that as a rule and custom of the office, and of the council, a petition like unto this, is first presented, and then a resolution is prepared, if upon examination it is found to have been certified thereon by the city solicitor that the petition is in due form and contains the necessary names; that when he found the paper these various sheets were fastened together in the form in which we now have them. There is no evidence submitted tending to show that the usual course to which he now testifies was not pursued in this case. There is no evidence tending to show that this petition was not a part of the papers fastened together as we now find them, at the time the resolution was adopted by council, and at the time the various proceedings were taken for the appropriation of this property and the opening up of this

street. The presumption of the continuance of things as found alone would require us to hold, in the absence of any evidence to the contrary, that the original form of the paper was as we find it, all these sheets being fastened together and having this back on them.

The petitioners admit that they signed this petition, and that it was signed by them sometime prior to this action by the council; they think prior to the year that the council took action upon it. There is evidence that they also signed another petition asking for substantially, if not exactly, the same thing; and another petition is presented here, and witnesses are questioned about it. That petition answers to the description given by the plaintiffs of that which they signed, and which appears to have been signed in the year 1892.

We think there is no evidence to impeach this document, and no evidence authorizing us to find that the petition was not originally a part of the document. We therefore do find that the petition was a part of the document, and was attached to the resolution, and that it was upon the faith and authority of this petition that the council proceeded to make this improvement.

As to the question whether there was irregularity in the action in the probate court, the confessing of judgment for \$1,500, instead of impanneling a jury, and submitting evidence, and requiring a verdict of the jury awarding the amount. It is not averred that there was any fraud, or collusion, or unfairness in this transaction; it is not averred that the amount for which there was a confession of judgment, or which it was agreed should constitute the amount of the award, was excessive in any degree; or that these plaintiffs were in the slightest degree prejudiced in any way by this action.

It seems to us that the city acted substantially in the capacity of a trustee for the petitioners in acquiring the property necessary for the improvement that they petitioned for. They had agreed that the expense should be assessed upon their property, and therefore it devolved upon the city to exercise good faith to undertake to preserve and to protect the rights of the petitioners, but in the absence of any averment of any wrong or any

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prejudice, we do not think that there was such an irregularity in these proceedings as would invalidate them. For my own part, I am not able to say (supposing it to have been fairly and honestly done) there was any irregularity about it. I do not understand why the city and the owners of the property can not agree upon the amount. It seems to be that the statute (see Sections 1692 and 2232, Revised Statutes, *et seq.*) authorize the city to acquire property for such purposes by purchase or agreement as well as by condemnation proceedings, and that if they can obtain it at a fair price by an agreement or compromise, they may do so; and when the petitioners ask that the council shall proceed to pass the necessary legislation to cause proper appropriation proceedings to be had to acquire the property, the fair construction of that is, if the city is not able to obtain it at a fair and reasonable price without condemnation, then the city is authorized to proceed by appropriation proceedings to acquire the property. At all events, we agree that there was no irregularity in this that would invalidate the award. The city was contented with it, the owner of the property was contented; the city is not questioning it, the owner of the property raises no question about it. The city paid the award, the owner of the property accepted the award, and the city took possession of the premises and has since held them. And we do not think, even if this were an irregularity, that it now lies in the mouths of the plaintiffs to complain, unless their complaint is based upon an averment or charge of fraud or prejudice of some sort.

The petition avers that the plaintiffs were not benefited by this improvement. No witnesses were called upon that subject. If it devolved upon the city to show benefit as the pleadings stood (which we very much doubt), we think that situation is changed when this petition is produced, with the petitioners setting forth in their petition that they believe and acknowledge that their respective properties would be especially benefited by the improvement, and that they direct and consent that their respective properties may therefore be assessed for the improvement. Though perhaps not absolutely estopped thereby from saying that they derive no benefit, they should at least furnish evidence sufficient to sustain the burden of proof thereby

cast upon them, to show that they did not derive a benefit from the improvement.

That brings us to the principal question in the case, which is whether the plaintiffs who petitioned for this improvement or whose grantors petitioned for the improvement, are bound to pay the assessment because of their having petitioned.

I pass over without discussion the question whether this expense may be assessed upon abutting property owners under ordinary circumstances, where no question of estoppel arises, because we understand that has been decided in favor of the contention of the petitioners, in the case of to which I have referred, *i. e.*, *C., L. & N. R. R. Co. v. Cincinnati*, *supra*, which we followed in *McGlynn v. Toledo*, 22 C. C., 34. In the *McGlynn* case it was contended that the petitioners were estopped, because they had petitioned for the improvement, which in that case consisted of the grading and paving of a street. The expenses assessed upon the property of which the property owners in that case complained were awards of damages on account of change of grade of the street, and we held that they were not estopped, because the evidence did not show us that the property owners were so far aware of the fact that the city was proceeding upon the faith of the former decisions of the Supreme Court with respect to the law as to be estopped from asserting an objection to the assessment. The decision turned rather upon a question of the construction of their petition, which did not set forth specifically and distinctly that they agreed to be assessed expenses of this particular nature, and we held that therefore they should be deemed to have petitioned for and consented to such assessment only as would be legal and valid; that it should be assumed that what the parties asked for at the hands of the council was, that it should proceed under valid laws, and according to law, to make the improvement and the assessment. But in the case at bar we find no opportunity for putting a construction upon this petition which would sustain it as consenting to a part of the costs and expenses to be involved in the improvement, and which would not sustain it as to the remainder; for the whole improvement consists in the extension of the street, and the whole cost and expense incident to it is that arising

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from the acquisition of the property necessary for the extension. So that it appears very clearly and distinctly, that the petitioners applying to the council to make this improvement consented and agreed that the cost and expense should be assessed upon their property. Are they, under these circumstances, bound by their agreement or by estoppel? We think they are. We think they are bound, applying the principles laid down by our Supreme Court in *State v. Mitchell*, 31 Ohio St., 592, and in *Columbus v. Sohl*, 44 Ohio St., 479. I read a paragraph from the case last cited, page 482. The law in that case under which the improvement, consisting of the paving of a street, was made, was held by the Supreme Court to be unconstitutional and void, and yet the assessments made under and in pursuance of that law were sustained and enforced, and they were enforced because, as stated in *State v. Mitchell*, *supra*, the parties by their action in invoking the aid and assistance of the council under the law were estopped, and because, as stated in *Columbus v. Sohl*, *supra*, they were bound by their agreement. The paragraph to which I refer is as follows:

“The law was invalid, and no authority was derived from it, for the making of the improvement, beyond the extent to which it had been adopted by all concerned as a scheme for improving North High street. Its provisions simply furnished the terms of an agreement among the concurring property holders, and the basis of a commission from them to the agencies of the city for the improvement of the street; and the rights and liabilities of all parties, including the city, are to be determined by the law of contract and agency, and not by any statutory powers that may have been intended to be conferred by the Legislature; for the act being invalid could confer none.”

Sohl, the defendant in that case, was held because he had petitioned for the improvement.

In *State v. Mitchell*, *supra*, it was said that parties who had participated in the business leading up to making the improvement would be bound, but just how far they would be required to participate in order to be bound was not very clearly indicated, the court suggesting that that question could be presented if the parties sought to resist the collection of the assessment. But in the Sohl case it was held that it was a sufficient partici-

pation to petition for the improvement. In the Mitchell case it was held that not only the commissioners who acted under that law, but also those who petitioned for the improvement, were bound.

It would be manifestly unfair and unjust to the city for parties to petition for an improvement and agree to pay the costs thereof, and afterwards, upon some technicality, saddle the expense upon the tax-payers of the city generally. Circumstances often arise in which a city may be willing to lend its aid by legislation and such machinery as is provided by law to parties to make an improvement, if the parties are willing to pay for it, where the city would not agree to do so unless the parties would agree to pay for it. The statutes upon the subject of assessments, Chap. 4, Tit. 12, Div. 7, provide that improvements of this kind may be paid for by the city out of the general funds. I read from Section 2263, Revised Statutes:

“When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation.”

But Section 2267, Revised Statutes, provides that the council may decline to do that, and may require a petition setting forth that all cost or some share of the cost shall be assessed upon the property of the petitioners; and where such petition is filed, the council shall proceed accordingly to assess all or such part of the costs as the petitioners consent to, upon the property specially benefited; and under this plan what is said by Judge Burket in *C., L. & N. R. R. v. Cincinnati*, *supra*, reading from pages 484, 485, is quite pertinent:

“Sometimes a municipality desires to open a new street, or straighten or widen an old one, in the line of general improvements, and for the general benefit and appearance of the municipality, and not for the special benefit of the lots and lands in a particular district. In such cases the compensation, costs and



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expenses for lands taken should be paid by the municipality out of its general revenue fund raised for such purposes.

"Sometimes the people in the vicinity desire to have a new street opened, or an old one straightened or widened, as a special benefit to their lots and lands, and when the same would not be sufficient benefit to the municipality to warrant the payment of the compensation, costs and expenses out of the treasury. In such cases, the municipality may refuse to act in the matter until the parties to be specially benefited supply the funds to pay the compensation, costs and expenses, or such portion thereof as the municipality regards fair and just, the same as is now authorized by Section 4651 as to public roads. By acting upon this principle the burden can be placed where it belongs without forcing people to contribute by assessments where they are not benefited, and where they are opposed to the opening, straightening, or widening of the street; and more than all else, their constitutional rights will be protected. If the present statutes are not broad enough, they can be amended."

In our judgment, in such a case as this, where the improvement is petitioned for, and where it is such an improvement as the council may legislate for and have made, and where the only question of legality is that touching the right to assess the costs back upon the property, and the parties expressly agree that it shall be so assessed, this statute is quite sufficient, in connection with the agreement, to make an assessment valid; and whether they are bound by contract or estoppel, or both, is perhaps immaterial. To us it seems that they are estopped by the contract or agreement, even though it may turn out to be an invalid agreement because the city was not authorized to enter into such an agreement. I may add that it seems to us that it is not necessary for the city to invoke the rule laid down in *Lewis v. Symmes*, 61 Ohio St., 471.

For the reasons stated we hold that as to the plaintiffs, Dale, Wilkinson, Miller, Hough, Van Hellen, Ott, Yearick and Caldwell, the petition should be dismissed at their costs, and that there should be a decree as prayed for in favor of Kate Hendrickson, Ada S. Long and Michael Murphy. There being a decree in favor of three of the plaintiffs and against eight, the costs will be apportioned accordingly; eight elevenths of the costs will be adjudged against the petitioners as to whom the

petition is dismissed, and three-elevenths will be adjudged against the city.

*Beard & Beard*, for plaintiffs.

*M. R. Bradley* and *C. S. Northup*, for defendants.

### JUSTICES OF THE PEACE.

[Circuit Court of Hamilton County.]

ROGERS V. PRUSCHANSKY.

Decided, January 22, 1902.

*Justice of the Peace—Jurisdiction of, Co-Extensive with the County—  
Appeal under Section 6494—Pleading.*

1. A justice of the peace has jurisdiction under Sections 583 and 6496 co-extensive with the county to issue orders of attachment and to accompany such orders with summons.
2. The common pleas court has no authority, upon appeal from the overruling of a motion by a justice of the peace for the discharge of an attachment under Section 6494 as amended, to entertain a new motion, or to consider anything but the motion filed before the justice of the peace; that motion having been determined, the case should be certified back.

GIFFEN, J. (orally); SWING, J., and JELKE, J., concur.

Heard on error.

This was a suit in attachment before a justice of the peace, and upon the overruling of the motion to discharge the attachment it was appealed to the court of common pleas under amended Section 6494, Revised Statutes (93 O. L., 141), which permits an appeal to be made upon the overruling of a motion to discharge an attachment.

Upon the hearing of the case in the court of common pleas the motion was sustained and attachment discharged; the question is raised in this case whether the court did not err in discharging the attachment on the ground that the court had no jurisdiction over the person of the defendant, he living in another township than the one for which the justice was elected.

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The statute gave jurisdiction to the justice of the peace co-extensive with the county prior to 1898; then Sections 582, 583 and 584, Revised Statutes, were amended so that Franklin and Cayahoga counties were excepted, leaving the jurisdiction co-extensive with the counties in all counties other than those two. The claim, therefore, is made that these amended sections are unconstitutional, and that therefore the court had jurisdiction of the person of this defendant although he resided in a township other than that in which the justice was elected. It was suggested during the argument that this defendant had entered his appearance, and therefore waived the objection, because our Supreme Court has a number of times recently held that where a motion addresses itself to any other relief than that of inquiry as to the jurisdiction of the person of the defendant, it is an entrance of appearance for all purposes. But counsel have since cited us to *Smith v. Hoover*, 39 Ohio St., 249, in which the motion was almost identical with this one, and asks for a dismissal of the case upon the ground that the court had no jurisdiction of the person, and that the said justice of the peace has no jurisdiction of the property of said defendant.

Now, in this case, the original motion filed in the justice's court did not have this second ground, but after it got into the common pleas court a new motion was filed, which included the second ground that the court had no jurisdiction of the property; so that the motion filed in the common pleas court is almost identical with the one decided by the Supreme Court. *Smith v. Hoover, supra*.

But clearly the court in this case had no authority to entertain the filing of a new motion, or consider anything but the motion filed before the justice of the peace, because at least this court has heretofore held, in another case, that this amended Section 6494, Revised Statutes, was intended not to give jurisdiction by appeal to the court of common pleas of the entire case, but simply for the purpose of determining the motion for the discharge of the attachment, and having done so, to certify the case back to the justice of the peace.

At any rate, the motion, as made before the justice of the peace, was not an entering of appearance, relying upon this authority in *Smith v. Hoover, supra*.

The question then is whether the amendment of Sections 582, 583 and 584, Revised Statutes, excepting Cuyahoga and Franklin counties renders the law unconstitutional. The question came up in Lucas county before the circuit court there, in *Collins v. Bingham Bros.*, 22 C. C., 533, and they declined to pass upon the constitutionality for the reason that if it be declared unconstitutional there would be no law applying to attachments, and that if they did declare it unconstitutional that they ought also to declare unconstitutional the repealing act, and that being so, the original law which gave the justice of the peace jurisdiction co-extensive with the county would be restored. And we are therefore inclined to adopt the course pursued by the circuit court in Lucas county, and decline to pass upon the question as to whether or not this is unconstitutional, because under this law, or under the law as it stood before that, the justice of the peace in Hamilton county would have jurisdiction co-extensive with the county.

The syllabus in this case is that—

“Where an act repealing another act and providing a substitute therefor is found invalid, the repealing clause must also be found invalid, unless it shall appear that the Legislature would have passed the repealing clause in any event. The Legislature by the act of April 19, 1898 (93 O. L., 146), amending Section 584, Revised Statutes, relating to attachments before justices by limiting the jurisdiction of justices in certain counties named without otherwise changing the law, did not intend to destroy the law upon such subject, consequently the repealing clause of the act in question would be invalid if the law were held unconstitutional.”

We think, therefore, that the justice of the peace had jurisdiction of the person and subject matter, and that the court erred in discharging the attachment, and the judgment will be reversed.

*W. E. Beall*, for plaintiff in error.

*C. T. Dumont*, for defendant in error.

**INJURY RESULTING FROM FRIGHT.**

[Circuit Court of Lucas County.]

**LOUISE OHLIGER v. TOLEDO TRACTION CO. ET AL.**

Decided, October 26, 1901.

*Mental Pain and Suffering when not Accompanied by Physical Injury—  
Damages for Injury from Fright.*

Where an injury resulting from the negligence of another is not of a physical character and is due entirely to fright, there can be no recovery.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

Plaintiff in error, who was plaintiff in the court below, brought an action against the Toledo Traction Company and Daniel H. O'Hara, charging that they had been guilty of negligence whereby she had been injured and suffered damages, which she sought to recover. The case was tried to a jury, and resulted in a verdict in favor of the defendants. A motion for a new trial was overruled. On account of alleged errors occurring in the court below, Louisa Ohliger prosecutes error here.

She charges in her petition that on June 7, 1900, she was a passenger upon one of the cars of the Toledo Traction Company, a company operating a system of street cars in the city of Toledo, and that through the negligence of the employes of the company in charge of that car, and the negligence of the driver of a certain garbage wagon owned by the defendant O'Hara, a collision occurred between the car and the garbage wagon. She says that she was very much frightened by the collision and suffered great agony and distress of mind in consequence of the fright. She also says that she was thrown violently forward from her seat in the car, and then jerked violently backward into the seat, whereby she suffered physical injuries, perhaps a fracture of one of the floating ribs, and of the pelvis, and a lesion of some of the muscles or tendons of the back. The jury returned a verdict in favor of the defendants. They also answered certain interrogatories submitted to them, as follows:

“1. Q. Was whatever injury the plaintiff sustained caused by fright? A. Yes.

“2. Q. Did plaintiff receive any physical or bodily injury at the time by reason of the collision? A. No.”

It seems that on the trial in the court below the chief controversy, if not the only serious controversy, was whether the plaintiff might recover for injuries resulting from fright alone, and that question is debated here—whether the plaintiff might recover for the distress of mind due to fright caused by the negligence of the traction company and the other defendant. The second question debated is, whether the general verdict and this answer to the second interrogatory were against the weight of the evidence.

In debating the question whether she might recover for injuries received from fright, counsel for the plaintiff in error have discussed it as if the question were whether if through fright she suffered any organic or functional impairment of the heart or other organ, that might afford a basis of recovery.

If the answer to the second interrogatory is to stand, that question is not involved, since that answer is that she suffered no physical or bodily injury at the time by reason of the collision.

There is evidence tending to show that after this collision and in consequence of it, she became extremely nervous and debilitated; unable to walk with ease, unable to perform her usual and ordinary work that she had been accustomed to perform before that time, and that she suffered great distress and pain in the back; all of which injuries the testimony tends to show may have resulted from the fright that she suffered on this occasion. On the other hand, there is testimony tending to show that before this collision she was weak and feeble, an infirm, delicate woman, and fully as bad off physically as she was after the injury; and that she was feigning, pretending that she suffered pain in her back; that is, that she was feigning so much as would appear to be in excess or aggravation of what she had previously suffered.

If the question were to be decided by us, we would not feel inclined to follow the authorities cited in support of the prop-

osition that there could be no recovery on account of physical injuries from fright, without giving the matter much more study and consideration than we have given it in this case. There are authorities to that effect, many of them decisions that are entitled to great respect; but it seems to us at first blush, and indeed after such consideration as we have given it, to be a harsh rule, and perhaps not in entire harmony with other rules upon the subject, though it may be the law. We might, if we were required to pass upon the question, find ourselves obliged to follow this line of decisions. It would seem, as I say, to be a harsh rule, to say that one suffering from fright in consequence of the negligence of another, if that fright resulted directly in a physical injury, as for instance a rupture of the heart or of a blood vessel, or paralysis, or some similar functional disorder, could not recover on account thereof; and yet it is conceded that for a mere physical injury, as for instance an injury produced by something coming in contact with the body, whereby there would be a contusion or an abrasion, or any other injury to the tissue or substance of the body, no matter how trifling, there might be a recovery, and such injury would let in proof of, and enable one to recover on account of other injuries resulting from the fright. But as I say, we do not feel obliged to pursue this inquiry or to decide upon this question of law, because the answer of the jury to the second interrogatory excludes it all. It is sweeping. It is to the effect that there was no physical injury resulting from this fright; that whatever injury the plaintiff suffered was from the fright, and that such injury was not physical; that therefore if she suffered any injury it must have been in the nature of distress of mind consequent upon the fright; and we think that the authorities are clear, uniform and consistent, to the effect that for such distress of mind standing alone, *i. e.*, when that is the only injury resulting from the negligence, there can be no recovery.

That leaves for consideration the question whether this general verdict and this answer to the second interrogatory are against the weight of the evidence. I will not undertake to discuss the evidence, and shall content myself with saying that

we can not find the conclusions of the jury are contrary to the weight of the evidence.

The verdict and judgment, therefore, will be affirmed.

*Southard & Southard*, for plaintiff in error.

*Smith & Baker*, for defendants in error.

### FRAUDULENT SALE BY A PROMOTER.

[Circuit Court of Darke County.]

#### SECOND NATIONAL BANK V. GREENVILLE SCREW-POINT STEEL FENCE POST CO. ET AL.

Decided, November 18, 1899.

*Corporation—Sale of Property to at a Profit—The Seller a Promoter and Trustee of the Profit Derived, When—Fraud Must be Shown by Clear Evidence—Liability of the Promoter—The Remedy.*

1. One may sell his own property to an association of individuals or a corporation at any price he may see fit and the purchaser is willing to pay, without regard to the profit he may thereby derive or the fact that he is himself a stockholder, provided only that no false representations are made.
2. But where the object in view is the formation of a company for the purpose of selling to it property belonging to another, at a price largely in excess of what the owner is to receive, the one thus negotiating becomes a promoter and occupies a fiduciary relation toward the company, and is bound to disclose his relation to the property it is proposed to purchase.
3. Suppression or concealment of material facts in such a connection is a fraud on the company, and renders the promoter liable as trustee for the profits thus wrongfully made.
4. Fraud of this character must be shown by clear and conclusive evidence, and can not be based on suspicion.
5. Three courses of action are open to a corporation thus fraudulently dealt with. They may restore the promoter to his original situation, rescind the contract and recover the money wrongfully made; or they may offer to restore, and by keeping the offer good sue in equity for a rescission and recovery; or the stockholders may join to charge the guilty parties as trustees of the profits thus withheld and for an accounting.



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SULLIVAN, J.; WILSON, J., and SUMMERS, J., concur.

Appeal.

The defendant, The Greenville Screw-Point Steel Fence Post Company, a corporation, was incorporated under the laws of Ohio, and organized and entered upon the business for which it was formed in June, 1895. For reasons not necessary to be stated here, the corporation in the following year, was, upon the petition of a part of the stockholders, dissolved, its affairs wound up and its debts paid in full.

The evidence set forth in the transcript of the testimony shows that W. K. Clyne, of Miami county, Ohio, on April 18, 1893, obtained letters patent for an improvement in fence posts, which consisted chiefly of a screw-point attached to the end of the post inserted in the ground.

That on November 5, 1894, he entered into a written contract with the defendant, H. D. Tilman, in which it was agreed that Tilman was to sell territory and posts, with the improvement covered by said patent, for Clyne, and to return to Clyne one-half of the proceeds of such sales. That some time in March, 1895, Tilman (whether in conjunction with Clyne or not does not appear affirmatively from the evidence) conceived the notion of associating a number of parties together as partners, for the purpose of buying this patent, to sell territory and also manufacture the post for sale. Thereupon an instrument was drawn up, which recited that the subscribers thereto were to become "co-partners" under the firm name of "The Clyne Screw-Point Post Company," for the purpose of carrying on together the business of manufacturing and selling posts and territory, with the understanding that the territory was to cost \$15,000."

The contract provided that each party was to pay the amount set opposite his name signed upon this instrument. That the number of shares should be fifteen, and of \$1,000 each. This agreement was not to be binding upon any subscriber unless all the shares were subscribed. Before the number of shares had been subscribed, those who had signed were notified to appear at the court house in Greenville on June 8, 1895, for the purpose of organizing or launching the partnership. By whom

such notice was given does not satisfactorily appear, but it is immaterial by whom, in view of what occurred between the parties at that meeting.

After the parties came together, they concluded to abandon the plan of a partnership and form a corporation; thereupon the necessary steps were taken to obtain a charter, and all who had theretofore subscribed to the instrument proposing a partnership subscribed respectively the same amount for the capital stock of the corporation. The several subscribers gave notes for their stock, instead of cash, payable in one and two years. These notes up to the sum of \$11,250 were made payable to Clyne, \$3,750 of the stock being reserved by Clyne.

In a settlement between Tilman and Clyne, this stock subsequently became the stock of Tilman. Upon what terms it became the property of Tilman there is a conflict in the evidence of Clyne and Tilman. However, it is wholly immaterial how it became Tilman's under the present status of the case. Whatever was done at this meeting by Tilman appears to have been done with the approval at least of Clyne.

The plaintiff, after averring its corporate capacity, sets forth in its petition that the defendant, the Greenville Screw-Point Steel Fence Post Company, on the 15th day of May, 1895, was a corporation duly incorporated under the laws of Ohio and had an authorized capital stock of \$25,000, divided into two hundred and fifty shares of one hundred dollars each, of which one hundred and fifty shares had been subscribed, paid up and issued by said corporation, and there were subscribed, paid up and issued, prior to the incurring by said defendant company the indebtedness to plaintiff described in its petition, the name of each subscriber, and the number of shares subscribed for, by each, as set forth.

It then avers that on the 15th of May, 1896, the said Fence Post Company, being wholly insolvent, an action was commenced in Darke county common pleas against the same by certain of the stockholders to dissolve said corporation and to appoint a receiver to take charge of its assets and effects.

And that such proceedings were thereafter had in said action that said corporation on the 15th of September, 1896, was dis-

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solved, a receiver appointed who converted all the assets of said company into money, paid costs of the proceedings and applied the balance in payment upon the indebtedness of said company, and after applying said balance there still remained due and unpaid an indebtedness against said company of \$1,650, of which sum there was due and owing plaintiff a balance of \$941.44, for money loaned to said company, and for which said company had executed its notes to plaintiff.

The plaintiff then set forth, so far as known, the names of all other creditors of said company. Plaintiff averred that by reason of the premises the defendant stockholders named became liable to plaintiff and the other creditors of said company to an amount, equal in amount to the stock owned by each. Wherefore it prays that the creditors of said company and the amount due each might be ascertained by such method as the court should direct; determine the amount in which each of the stockholders is liable to plaintiff and other creditors of the company, and that the court order the payment of such amount by each stockholder for the purpose of paying said claims, and all other relief as in equity the circumstances of the case may require.

The cross-petition filed by the receiver in this case, and upon the averments of which arise the issues to be determined, after setting forth that the corporation had been dissolved, its affairs wound up and all its debts paid, charges that the defendants, Tilman, Armstrong, Halderman, Van Lue and Eidson, combined and confederated together for the purpose of cheating and defrauding all other parties who had become, or might become, stockholders in said corporation. That the fraud which they together had perpetrated upon their co-stockholders and members of said company consisted in having falsely represented to their associates that the improvement they were purchasing was a valuable invention, and that it could not be purchased from Clyne for less than \$15,000, and that they had procured said Clyne to sell the same to the company for that sum, and falsely represented that Clyne had agreed if they could raise \$10,000 and that he would remain interested with them to the extent of \$5,000 and that thereafter he, Clyne, would dispose of this amount to such persons as the other stock-

holders might select. That each of the confederates named subscribed \$1,000 to the capital stock of the corporation. That these subscriptions by such confederates were a mere pretense upon their part; that they neither paid cash nor gave their notes as the others had done. There are other charges of fraud and fraudulent representations not necessary to mention here, as the bill does not disclose that any proof was offered to sustain them. Believing such representations, and upon the strength of them, the other parties in good faith became stockholders in the corporation, and complied with all the obligations upon their part respecting the same.

The court below found from the evidence that neither of the five parties charged with the fraud had paid their subscription and entered up a judgment against them respectively for the amount of the same, with interest on the one-half thereof from June 8, 1896, and the remaining one-half from June 8, 1897, and found from the evidence that the defendants, Tilman and Halderman, had secured to themselves a secret profit in the sum of \$6,050 by representing to the company that the patent could not be bought for less than \$15,000, when in fact, out of the amount raised from the notes given, they paid Clyne \$3,000 and no more: that whilst these confederates were representing to the other parties, who became stockholders, that said patent could not be purchased for less than \$15,000, they had in fact an agreement with Clyne to purchase it for \$3,000; that upon such representations they secured to themselves a profit of \$6,050 that belonged to the corporation; and therefore a judgment for that amount was entered up against Tilman and Halderman, in favor of the receiver, together with interest on the one-half thereof from June 8, 1896, and on the remaining one-half from June 8, 1897. From this judgment the defendant, Halderman, took an appeal to this court.

The case was heard upon the pleadings, transcript of the testimony taken in the court below, and some additional testimony taken at the trial here.

The first question to be determined from the evidence is the relation that the defendants, Tilman and Halderman, sustained to the company or to their associates, each of them being a

member of the corporation. If Tilman had been the owner of the patent, then he would have been entitled to any profit there might have been upon the sale of it to the company, although a member of the company. If he purchased the patent in his own name and then sold it to the corporation, although it was organized by him, he would not be a trustee of the corporation. See *Milwaukee Cold Storage Co. v. Dexter*, 74 N. W. Rep., 976 (99 Wis., 214), fifth syllabus:

“Any man or number of men who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent representations made by the vendors to their associates. They are not bound to disclose the profit they may realize by the transaction.” *Densmore Oil Co. v. Densmore*, 64 Pa. St., 49.

See *Milwaukee Cold Storage Co. v. Dexter*, 74 N. W. Rep., 976 (99 Wis., 214, 229).

If Tilman was simply the agent of Clyne to sell the Patent and Tilman's compensation was simply a share of the proceeds of such sale, then Tilman could not be held for any profits he may have made, but would be liable only for any damages accruing to the corporation from any false representations made by him, not authorized by Clyne.

However, it is not necessary in the present status of the case to determine whether Tilman acted simply as the agent of Clyne or whether Clyne and he were acting together in the organization of the corporation and the sale of the patent to it, as the evidence, we think, clearly shows that Tilman's representation to those he was seeking to induce to become stockholders was that the patent was held by Clyne at \$15,000, and that he could not purchase it for the company from Clyne at a less figure, holding out to such parties all the time that the corporation, of which he was a stockholder and which he was active in promoting, must pay that figure to Clyne before they could get the patent, concealing all the while from his associates the arrangement he had made with Clyne, as stated in his own testimony. His entire conduct was such as to invest his associates with an honest belief that the entire sum was to go to

Clyne, and that the reward, or rather remuneration he expected for his efforts in accomplishing the organization of the company and getting it to operating, was that which would come to him on his stock, just like any other stockholder. We think his own conduct contradicts the claim he now makes, that he stated to all the parties, except two, that he was simply endeavoring to sell the patent as Clyne's agent.

We think the evidence shows that he was inspired solely to become a member of the company and thereby induce his associates to believe that he was interested in the enterprise, with no other expectation of profit to himself except such as would accrue in common to all, for no other purpose except to enable him to make a profit upon a sale of the patent to the company.

We have very high authority defining who and what are promoters. In *Yale Gas Stove Co. v. Wilcox*, 29 Atl. Rep., 303, 307 (64 Conn. 101), reading from the opinion of the court, in which the court says "who and what are promoters, so called, of corporations, and what their relations are to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. A 'promoter' has been defined to be a person who organizes a corporation. It is said to be, not a legal, but a business term, usually summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence. \* \* \* That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote, is well settled by the decisions of both countries."

The original instrument, drawn with a view to the formation of a partnership, was inspired by him, and he was active throughout, and therefore a promoter. In his relation to the company, it was his duty to act for the best interests of it like any other stockholder, and therefore he could not withhold any secret profit made by him.

Tilman's first object was the formation of some kind of a company with a view to the sale of the patent. The kind of company that could best do this, and thus accomplish the end he had in view, may not have been in the beginning very clear

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to his mind, but he ultimately succeeded in forming one and reached the result he was after, *i. e.*, sale of the patent. He became a member himself, and certainly concealed from every one that the effort he was making was for an expected profit from such sale. He was then a promoter, and sustained a fiduciary relation to the company, and as the court say in the case last above cited, page 122 of the opinion, "he must make full disclosure to the company of his relations to the property, that is the subject of his deal. Suppression, concealment, or misrepresentation of material fact is fraud; upon proof of which rescission of contract or repayment of secret profits will be compelled."

Though he may have been acting as agent of Clyne, yet the relation he sustained to the company was that of promoter and as such it was his duty to have disclosed the true arrangement he had with Clyne. *Yale Gas Stove Co. v. Wilcox*, 29 Atl. Rep., 303 (64 Conn. 101); *Exter v. Sawyer*, 47 S. W. Rep., 951 (146 Mo., 302), 2d Syllabus; *Franey v. Warner*, 71 N. W. Rep., 81 (96 Wis., 222).

Upon the discovery of the wrong perpetrated by Tilman upon his associates, three remedies were open to them to redress such wrong: (1) They could, by restoring Tilman to his original situation, have rescinded the contract and recovered their money; (2) or they might have offered to restore, and by keeping such offer good, sued in equity for a rescission of the contract and a recovery of their money; (3) or, as in this case, without restoring or offering to restore, all stockholders who were in a similar situation could join in a suit in equity to charge the guilty parties as trustees of the profits fraudulently retained by each, and an accounting.

This being an action to require an accounting for the secret profits, made by Tilman between the amount actually paid Clyne and that which was obtained from the company, what part, if any, does the evidence show was received by Halderman? The bill does not show by any direct or positive evidence that he received any part of it; neither is it shown by any of the circumstances. At best the evidence merely creates a suspicion that Halderman participated in such profit.

There are many things that were done by Halderman that would seem to justify such suspicion. First, the active part he took in securing others to go into the enterprise, and his knowledge that some were securing advantage over others. Second, his association with Tilman. And, lastly, his conduct and contradictory statements made with reference to the notes he gave after trouble arose. However Tilman swears that Halderman never received a dollar of the profit, and not only that, but he swears that Halderman never knew but what it was true that \$15,000 was to be paid to Clyne. Halderman swears to the same. True it might be claimed that they were not entitled to credit, and that these sworn statements in this respect should not be received. But they are corroborated by the fact that none of the notes given were made payable to Halderman; not a particle of evidence that any were endorsed over to him, or that he ever presented any of them for payment. On the other hand, the evidence shows that all that were sold were negotiated by Tilman and Clyne, and the proceeds of such sales were divided between Tilman and Clyne, Tilman receiving the smaller amount when the division was made.

Yet it is urged that with all this, Tilman could have divided the money he received with Halderman. Fraud must be shown by clear and conclusive evidence, and if the court should so find, it would have to do so from suspicion alone, and not from the evidence. It is, however, claimed that though Halderman may not have received any such profit, yet he, being a confederate with Tilman, and aiding Tilman in the perpetration of the wrong, that therefore he is equally liable with Tilman. This would be true if the evidence showed that Halderman knew that the representations made by Tilman to secure such profit were false and fraudulent. There is no evidence showing that he did know. He never saw Clyne; never knew him; never had any correspondence with him. He and Tilman both swear that Halderman never knew anything of the arrangement between Tilman and Clyne. Halderman evidently believed that the improvement was a good thing, and there is no evidence but what the improvement is fully worth every cent paid for it. There is no such clear and conclusive evidence as the law requires



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to justify the conclusion that he did know. If he did not, then he could not be held liable for any part of the profit received by Tilman.

What Halderman should have done when the wrong of Tilman was discovered, was to have paid the amount of his subscription to the treasurer of the company instead of to Tilman; we think the evidence shows he paid it afterward.

Judgment therefore for the amount of his subscription will be entered up against him in favor of the receiver, with six per cent. interest on the one-half from June 8, 1896, and on the remaining one-half from June 8, 1897, and to be paid within ten days from the date of this decree, or execution will issue therefor; and judgment against Tilman for \$6,050 with interest at six per cent. on the one-half thereof from June 8, 1896, and on the remaining one-half from June 8, 1897, less the amount of notes returned by him with interest thereon, as provided in said notes. Several of said notes are endorsed by Clyne and we presume they are good. In any event Tilman should not be charged with anything not received by him. Judgment against Tilman to be paid in ten days from date of decree, or execution to issue therefor.

The costs of appeal and those of this court will be taxed up to Halderman and Tilman in the proportion as the judgment against them bear to each other. This case will be remanded to the court of common pleas to carry these judgments into execution. In view of the fact that there will be other services to be performed by counsel for the receiver in that court that can not now be estimated, the amount of fees for such counsel may be fixed by that court.

Entry may be drawn setting forth the above finding and judgments.

*Ellist & Chenowith and John C. Clark*, for plaintiff in error.

*Anderson & Bowman, Allread & Teegarden and Williams & Krickenberger*, for defendant in error.

**INJURY FROM DEFECTIVE SIDEWALK.**

[Circuit Court of Lucas County.]

CITY OF TOLEDO V. WILLIAM RADBONE.\*

Decided, October 26, 1901.

*Damages—For Injury from Fall on Defective Sidewalk—Proof of Constructive Notice of Condition of the Walk—Injury Treated with Home Remedies and Grows Worse—Pleading—Charge of Court—Exceptions to Charge—Verdict not Excessive.*

1. An averment of knowledge on the part of a municipality of the dangerous condition of a sidewalk is a sufficient basis for the introduction of testimony tending to establish constructive notice of the condition of the walk.
2. It is not competent for one who has filed a general exception to a charge of the court to afterward select a single sentence or paragraph for complaint, where the court was not asked to charge specifically on that point.
3. Where it is complained that the trial judge has made a correction in his charge since it was delivered, and has thereby eliminated error from it, and it appears that the correction did no more than make the charge consistent throughout, a reviewing court will take the record of the charge as it finds it.
4. One who has suffered an injury through the negligence of another is not barred from recovery therefor, because he did not call a physician at once, but treated himself with home remedies until a serious complication developed.
5. R suffered a fall on a defective sidewalk, causing abrasions and contusions of the skin, which developed into ulcers, incapacitating him to a considerable extent and causing him great distress.  
*Held:* That a verdict of \$1,500 damages was not excessive.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

William Radbone brought an action in the court of common pleas of this county to recover from the city of Toledo on account of injuries which he averred he sustained by falling upon a sidewalk which he charges was defective. He says that his fall and his injuries were in consequence of this defect, and that the city was negligent in permitting this defect to exist. It

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\*Affirmed by the Supreme Court.

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is said on behalf of the city, that the verdict is against the weight of the evidence, but this is not insisted upon in argument; nevertheless, being assigned as a ground of error, we have carefully read the record, and are of the opinion that the verdict is fully sustained by the evidence; that the defendant in error made out a very clear case against the city.

The petition avers that the city had knowledge of this defect for some time before plaintiff sustained his injury. Upon the trial of the case, evidence was admitted tending to show that the defect had existed for so long a time that the city was chargeable with constructive notice thereof. There was no proof of any actual or direct notice, or of any actual knowledge by any person whose knowledge would be knowledge of the city. At the close of the evidence, counsel for the city moved the court to direct the jury to return a verdict for the defendant, on the ground that the petition did not allege constructive notice, and that no actual notice had been proven.

We think there was no error in admitting this evidence in support of this allegation, or in overruling this motion. We think an averment of knowledge in a case of this character may be sustained by evidence of facts from which constructive notice would arise; in other words, that from such a state of facts as is shown here, the city is chargeable with all the effects of knowledge.

It is complained that there was error in the charge as it was given upon the subject of the circumstances that would render the city liable, but it is conceded that there is no error in the charge as it stands now in the record. It is said that there has been a correction made, and it appears that this correction was made by the judge who delivered the charge.

We must take the record as we find it. We will say in passing that it appears to us to be quite apparent that the correction was right; that the learned judge never gave the paragraph to the jury, standing alone as a proposition by itself, as it stood before the correction was made. In other words, the sentence as it stood would have been in effect a direction to the jury to find a verdict for the plaintiff below; and that, in view of the course pursued upon the trial by counsel and the court, and

the pains the court took before this, and afterward in the charge, to lay down all the rules of law applicable to the cause, would be entirely inconsistent, and would be very absurd. The sentence standing right after that—"it is your duty to find a verdict for the plaintiff, unless guilty of negligence himself directly contributing to his injury," as charged, is correct. That is simply the termination of a long sentence, setting forth the circumstances under which the city would be responsible, which is entirely unobjectionable. The correction consisted in striking out a capital "A" of the word "And," at the beginning of a part of this sentence, and putting in a small "a," and changing a period to a comma—a mere correction in the punctuation of the sentence.

It is also contended that there is error in the charge upon the subject of the duty of the plaintiff below to employ a physician. It appears that when he fell he bruised and knocked the skin off his shin, and that he undertook to treat the injury himself, supposing that it was trifling, by the application of some home remedies, such as arnica, bandaging, etc. In the course of about three weeks he found that the hurt was not healing, but was becoming worse, and thereupon employed a physician. The injury ultimately resulted in ulcers, which caused him a great deal of distress, and disabled him to a great degree.

The part of the charge on this head which is complained of is a single sentence in a paragraph which is devoted to this subject, which sentence reads: "A mistake in treatment to his limbs, a mistake in judgment in the result, would not bar his recovery or mitigate the damages."

It is insisted that the court should have qualified this by saying that if the mistake in judgment was such as an ordinary prudent man might have made, would not be barred from recovery. We think that no qualification is required; that the injured person is to proceed upon his own judgment, or such judgment as nature or his Creator has given him, and is not bound to satisfy the judgment of somebody else. But taking the whole paragraph on that subject together—I will not take time to read it—it seems to us to be entirely correct. It is not admissible for a person who has filed a general exception to the

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charge, and has not asked the court to charge specifically upon a subject, to afterwards pick out a single sentence in a paragraph and complain of that. He must take the whole charge together. We think there was nothing wrong, nothing misleading, in this charge upon this subject.

Finding no error in the record, the judgment of the court below is affirmed.

*M. R. Brailey and C. K. Friedman*, for plaintiff in error.

*King & Tracy*, for defendant in error.

#### FIDELITY BONDS RENDERED INVALID.

[Circuit Court of Lucas County.]

IMPERIAL BUILDING & LOAN CO. v. UNITED STATES FIDELITY  
& GUARANTY CO.

Decided, October 19, 1901.

*Fidelity Bond—False Answers by Applicant For—Render the Bond Invalid, When.*

Answers by an applicant for an indemnity bond, to the effect that he had never applied to another company for bond and had never been refused bond by another company, are material and vital; and where such answers are false, and the party for whose benefit the bond was executed had knowledge of their falsity, the bond is rendered invalid.

PARKER, J.; HAYNES, J., and HULL, J., concur.

In the court below the parties stood in the same position upon the record as they stand in this court, The Imperial Building & Loan Company being the plaintiff and The United States Fidelity & Guaranty Company the defendant. The action was upon an undertaking by the defendant guaranteeing the faithful performance by one James Thomas Morris, of Mansfield, Ohio, of his duties as agent for the plaintiff. It appears that as agent for the plaintiff he had collected some \$524.75, which he had embezzled. Defendant had given bond to indemnify the plaintiff against any frauds of this character upon the part of

Morris. Morris, upon being required by the plaintiff to give some surety for the faithful discharge of his duties, had made application to the defendant to guarantee his fidelity.

In the application, which was upon a blank furnished by the defendant, certain questions were asked of him and answered by him, and among others, these:

"Q. Have you ever applied for a bond in this or any other company? A. No.

"Q. If so, state name of company, the date, name of employer, and whether accepted or declined. A. No.

"Q. Have you ever been refused the issue or continuance of a bond on your fidelity by any company? If so, give particulars. A. No."

The employer, the plaintiff, was also required to make a statement, upon a blank furnished by the company, and the statement which it made reads as follows:

"The replies of the applicant herein are to the best of my knowledge and belief correct. He has been in the service of the undersigned employer since December 1, 1898, filling position of solicitor, and has continuously filled the position for which this bond is required since December 1, 1898, but we add new duties now. He has always, to the best of my knowledge and belief, given satisfaction in his personal conduct and performance of duties, and kept his accounts faithfully and without default."

There is more of this, but the material part is, "The replies of the applicant herein are to the best of my knowledge and belief correct." This is signed by T. E. Brady, the secretary of the company, on behalf of The Imperial Building & Loan Company, the employer.

It appears that shortly before this application was made to the defendant, Morris had made application to another company, The American Surety Company, for a bond of this character to be given to this same employer, which application said company rejected, and that this secretary of the plaintiff was aware of that fact, and of the fact that The American Surety Company had not passed favorably upon the application, is fairly inferable from the evidence. There is correspondence between the secretary of the plaintiff company and Morris, indicating

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that they were both aware of the fact that this application had not been accepted, but had been rejected, before these answers that I have read were made by them respectively.

The falsity of these answers is adduced as a defense to the action upon the bond. Without entering into a full discussion of the matter, we have simply to say that we regard the representations contained in these answers to these questions as being material and vital. They are representations with respect to matters about which the defendant had a right to be informed, as affecting the hazard involved in the giving of this bond. They are similar in character and of like effect with representations made by a person applying for life insurance; for instance, that he had never been rejected by any other company; or by a person applying for fire insurance, that the risk had not been rejected by any other company; or that he had not suffered any loss by fire. If truthful answers had been made to these questions, it can not be doubted but the defendant would have at once rejected the application, or at least have advised itself as to the grounds upon which The American Surety Company had rejected the application. The defendant had the right to know the facts, and to require truthful answers to these questions.

The judgment of the court below was in favor of the defendant upon this defense, and we discover no error in that.

It is also contended that the bond is not broad enough in its terms to cover this particular occupation, but upon that question also we think the conclusion of the court below was correct. Therefore the judgment of the court of common pleas will be affirmed.

*Clayton W. Everett*, for plaintiff in error.

*Chittenden & Chittenden*, for defendant in error.

**CONTROL OF SCHOOLS SUPPORTED BY ENDOWMENTS.**

[Circuit Court of Lucas County.]

STATE, EX REL ROHR, V. ADAM SCHAUSS ET AL.

Decided, October 19, 1901.

*Schools—Endowment of, for Public Benefit Does not make "Public" Schools—Acceptance of Trust Funds for Support of—Authority to Control—Courts can not Interfere with Discretion of Board of Directors—Unless upon Denial of Some Positive Right of the Public—Reasonable Regulations.*

1. The directors of an institution of learning are at liberty under Section 4096, relating to trust funds for the endowment, maintenance and aid of such schools, to reject a proposed donation if the terms under which it is offered are not acceptable, but donations which are accepted must be accepted in accordance with the terms prescribed.
2. A manual training and polytechnical school, founded and supported by private donations which have been accepted under Sections 4095 to 4104, is not a public school in the same sense that schools maintained under our common school system are public schools.
3. The authority to control schools thus founded on endowments is derived from Section 4099, and is vested in a board of directors who may delegate a part of their authority to a faculty, but not to an independent board.
4. There is no authority in the courts to interfere with a discretion exercised by a board of directors of such an institution in the management of its affairs, on the ground that an unwise policy is being pursued, so long as there is no denial of positive rights vouchsafed to the public.
5. A rule which discriminates against the students of a high school during the first half of their freshman year, by rendering it impracticable for them to pursue the course of the special school, is not on that account unreasonable or unjust, or a denial of the rights of such pupils.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on appeal.

This is a proceeding in mandamus brought into this court by appeal. The relator avers in his petition that the Toledo university is supported by general taxation levied by the board of education upon all the real and personal property in the city of



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Toledo, and that the persons named as defendants occupy the positions of directors and superintendent of the Toledo university, as indicated by their titles in the caption; that the relator is a resident of the city, and a tax-payer of the city of Toledo, and father and natural guardian of one William F. Rohr, who is a minor and citizen of said city of Toledo; that William F. Rohr is a member of the freshman class of the Toledo high school in the city of Toledo, and as such is pursuing the studies regularly taught in said school; that the Toledo university conducts a manual training school in a building situated upon a certain tract of land described, which, as appears from the averments as well as the evidence, is a part of the lot on which the high school building is situated. The building occupied by the university is really an extension of the high school building. The petition also sets forth that the university occupies this property in question, in pursuance of a certain contract which is in part a lease, that was entered into between the directors of the university and the board of education of the city district, on April 4, 1885. The petition sets forth the various terms of that agreement which I need not notice, other than the provisions touching the right of the relator, and relied upon by him, to-wit:

“It is also agreed between the parties hereto that said party of the second part shall erect upon the premises herein described a suitable building for manual instruction, to be approved by said party of the first part, and shall equip the same with suitable tools and machinery for such instruction, and shall furnish and maintain competent instructors for such manual training; and further, that no charge for instruction in such manual training school shall be made for the children, wards or apprentices of any citizen of said city; and such manual training shall be adapted to and at all times accessible to the pupils of the Toledo high school.

“It is expressly understood and agreed that the purpose of this grant is to secure to the pupils of the Toledo high school a wider and more extended range of instruction than that now furnished, and that the instruction furnished by the said Toledo university shall at all times be such as to be either auxiliary or supplemental to the studies pursued in the Toledo high school.”

The relator avers in his petition that by a rule and practice of the directors and superintendent of the university, his said son, who became a member of the freshman class of the Toledo high school is excluded from taking such course in the university as relator believes he has a right to take, and from pursuing such studies as relator avers he has a right and privilege to pursue; that relator's son is prohibited from pursuing his regular course in the Toledo high school, and at the same time pursuing the course that he desires to pursue in the Toledo university. And he says that this rule is a discrimination and prohibition against members of said freshman class; that the rule does not apply to and is not in force as to any other pupils of the university. He says that it "is unreasonable and against public policy, and a violation of the legal rights of each member of said class, especially of said William F. Rohr and of the relator as the parent and natural guardian of said William F. Rohr, and not within the discretion of said defendants."

"That the said defendants, by and through said Virgil G. Curtis, superintendent of said Toledo university, refuses to receive said William F. Rohr in the said school or allow him to enter the same, or to receive any instruction therein, unless he shall abandon and forego receiving any instruction in the Toledo high school, and will sever his connection therefrom, notwithstanding that members of other classes of said Toledo high school are admitted and allowed to receive instruction therein."

The rule to which these objections are made was adopted by the directors of the university on September 5, 1901, and is set forth in *haec verba* in the answer, as follows:

"Resolved, that all regular students entering the ninth grade of the public schools, who shall elect manual training, must pursue the correlative course as prescribed by this board, under the instruction of the teachers of the polytechnic school."

It will be seen that the resolution does not, by its terms, exclude those belonging to the freshmen class in the high school. And the testimony shows that this rule as adhered to is not extended; that is to say, that there is no other rule in force that might operate to exclude such pupils of the high school. This rule does not say that such students shall be prohibited from

entering the manual training school and taking the correlative course. It says that if regular students of the ninth grade of the public schools shall elect and shall take manual training, they shall take the correlative course.

The testimony shows, however, that the enforcement of this rule has the effect of excluding such members of the high school as belong to the ninth grade for the first half of the freshman year, since by this curriculum adopted by the directors of the university, the correlative course of study that is to be taken in connection with the manual training, and the hours prescribed for study and recitations are such to make it impracticable for one to pursue that course and those studies at the same time that he pursues the regular course in the high school. It is in that sense, therefore, that certain members of the freshman class of the high school are excluded from entering the university and taking the manual training at the same time.

Now, what the relator desires is, that his son shall be permitted to enter the university during the first half of his freshman year in the high school and take a certain course there, and not take the full correlative course prescribed in connection with the manual training. That he shall be permitted to take what is dominated "free hand and mechanical drawing;" and he says that his son is fitted for that by education and by the development of his mind, and that his business occupation outside of school makes it desirable that he should have this instruction. He claims, therefore, the right to have his son pursue his studies in the freshman class of the high school, and to pursue such studies as he may elect in the university, *i. e.*, such as will not interfere with the pursuit of his course in the high school. And the question for decision is, whether the court, at the instance of the relator, may interfere with this rule and regulation of the board of directors and superintendent of the university, and require of them that they shall receive this young man upon the terms he desires to have applied to his case.

This is contended for on behalf of the relator on two grounds: First, upon the ground that this right is secured to pupils of the high school by this agreement between the board of education of the city and the directors of the university, which was

entered into on April 4, 1885. And he claims the right as one of the beneficiaries, so to speak, one of the *cestuis que trustent* under that agreement, to enforce it for his own benefit.

It is not clear to us that the effect of the provision in that agreement that the instruction furnished by the university "shall at all times be such as to be either auxiliary or supplementary to the studies pursued in the Toledo high school," and shall be free and open to such students, is to give to every member of the high school, under any and all circumstances, a right to elect such course as he shall choose to pursue in the university. We are not clear, in other words, that such a rule as has been adopted here would be obnoxious to the terms of this agreement. But assuming that it is so, assuming that the agreement was originally enforceable at the instance and for the benefit of the relator, the question arises whether that agreement as to these stipulations is still in full force. It is clear that the right of the relator is dependent upon the agreement, and that if the agreement is not in force, his contention upon that ground must fail. It is equally clear that the authorities that made the agreement may unmake it.

It appears by the evidence that the nucleus, perhaps the substantial foundation, of the fund for this university arose from donations of certain persons formerly citizens of this city, Jesup W. Scott and his heirs, and Mr. Raymond, who gave substantial sums for the establishment of this university. What the terms and conditions were upon which these donations were made we are not advised. Counsel on either side claim nothing on that score. We simply have it that such donations were made. Nothing appears to have been done in pursuance of these donations until a certain act was passed in 1870, for the establishment of the University of Cincinnati, the act as amended being now included in Sections 4095 to 4104, Revised Statutes, and the passage of an act in 1873, which has since been amended (Sections 4105, Revised Statutes), making this act as to the Cincinnati University applicable to the city of Toledo; nor until the common council, in pursuance of that act of the Legislature, had adopted an ordinance which is found in Sections 678 to 683, revised ordinances of the city of Toledo; nor until after this

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agreement before referred to had been entered into between the board of education of the city of Toledo and the directors of the university, and the erection and equipping of the building in pursuance thereof.

The date when this school went into operation is not stated, but it was some time subsequent to April 4, 1885, and soon thereafter. As to the character of this school and as to the authority of the board of directors, we must look to the acts of the Legislature before referred to; and as to the agreement between these respective boards, representing the high school and the university, we are to look not only to the lease of April 4, 1885, but to certain subsequent transactions between those boards carried on in pursuance of subsequent arrangements or regulations. And going to the question last stated, we find this state of facts: That at a meeting of the board of education on July 16, 1900, Mr. Dowd, a member of the board, stated that he was in receipt of a communication from Mr. Adam Schauss, president of the manual training board, inviting the board of education to meet with the manual board for the purpose of consultation; that Gen. Hamilton moved that the manual training board be notified that the board of education will meet with them on the next Monday night, and that the clerk should notify them to that effect; and that his motion was carried. That at a subsequent session of the board of education, held on July 23, 1900, for the purpose of meeting with the manual training board in consultation, and for the transaction of other business, Mr. Ashley, on behalf of the university board, appeared before the school board and made certain representations with respect to what the university board had done and what they would like to do—what he conceived to be feasible. The import of it was that the university board desired to extend the course of study.

Up to that time, it appears that the only course of instruction in the university was that pursued in what was called the "manual training school," which consisted chiefly, if not entirely, of what the name would imply, experimental or manual training in certain arts and occupations; and it was proposed to add what they denominated a polytechnic school, for the carrying on of the study of arts and sciences, on what may have

been perhaps more theoretical lines. This was laid before the board of education, and a committee was appointed to act in conjunction with the committee of the university board, and that committee made a report on August 6, recommending this extension of the studies and instruction in the university, *i. e.*, the establishment of this other branch of the university which they had termed the polytechnic school, and to that report was appended a special report of a proposed curriculum. That curriculum is not carried into the journals, but it has been presented to us here. All this was agreed to and adopted by a very decisive vote of the board of education, there being three votes in favor of the motion, and but one against it.

It appears that the course of study that is now being pursued in the university is based upon that curriculum; that in pursuance of this arrangement and agreement with the board of education, the university board on September 5, 1901, adopted the resolution to which I have referred, and to the enforcement of which relator objects. And thereafter, some members of the board of education, not being satisfied with the result of the operations under this resolution, moved that the university board be requested to set it aside, but that resolution was put to a vote and lost. It fairly appears to us that so far as the board of education of the city of Toledo is concerned, it is acceding and consenting to the enforcement of this rule as it is enforced with the effect stated.

That being true, it appears to us that the relator is not in a position to rely upon the terms of the lease of 1885 that has been referred to, for the reason that this resolution, as it is interpreted and put in practice, with the knowledge, acquiescence and consent of the board of education, amounts to a modification of the terms of the lease, in so far as it may have secured to all students in the high school a right to enter the university; that if that lease provided that each and every student might enter whatever class he pleased in the university, and might take there such studies as he pleased, that part of the lease has been abrogated by the subsequent transactions of the boards.

That, therefore, leads us to a consideration of the other question, *i. e.*, whether this is a public school, supported by public

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revenues, of a character that the relator may ask and require what he seeks; whether he, as the representative of one of the persons entitled to participate in the advantages of the university, may require that its directors shall so modify its rules as to the admission and instruction of students as to accommodate him in the way he desires. We do not understand that this is a public school in the sense that our common schools, established and supported under the general common school system of the state, are public schools. It is a public school in the sense only that the tuition is to be free. The character of the university is, we think, indicated very clearly by the statute providing for its maintenance. Section 4095, Revised Statutes, reads:

“The board of directors of the university of the city of Cincinnati in the name and behalf of the city, may accept and take any property or funds heretofore or hereafter given to the city for the purposes of founding, maintaining or aiding a university, college or other institution for the promotion of free education, and upon such terms, conditions and trusts, not inconsistent with law, as the said board of directors may deem expedient and proper for that end.”

That is to say, they may accept of the donation if the terms prescribed by the donors are not contrary to law or are not deemed inexpedient by the board. So that it becomes a school, subject, to some extent, to the terms and conditions of the trust or donation; and in that respect, of course, it is quite different from the common schools. In Section 4096, Revised Statutes, we find this with respect to how the trust funds are to be employed:

“For the further endowment, maintenance and aid of any university, college or institution for the promotion of free education, heretofore or hereafter so founded in said city, the board of directors of the university thereof may, in the name and in behalf of the city, accept and take as trustee, and in trust for the purpose aforesaid, any estate, property or funds, which may have been or may be lawfully transferred to the city for such use, by any person or body corporate having the same, or any annuity or endowment in the nature of income which may be covenanted or pledged to the city toward such use by any person

or body corporate; and any person or body corporate having and holding any estate, property or funds, in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign, transfer and deliver over the same to said city as trustee in his or its place, or covenant or pledge its income, or any part thereof, to the same; and such estate, property, funds or income shall be held and applied by such city in trust for the further endowment or maintenance of such university, college or institution, in accordance, nevertheless, with the terms and true intent of any trust or condition upon which the same was originally given or held."

Since we have not present for our consideration any of the terms or conditions upon which this trust fund was donated, I do not read this for the purpose of the consideration of any question that might arise upon the terms of the donation. I read it for the purpose of showing the character of the school; that it is a school that is subject to the terms and conditions imposed by the donors who gave the property or money in trust for the school. The directors are at liberty to reject a proposed donation if in their opinion the terms are unlawful, or for any reason unacceptable to them. If they accept it, they must accept it upon the terms prescribed.

We find nothing in this law prescribing that the course of studies shall be so mapped out and arranged and pursued as to permit of all students of the high school, whatsoever may be their class, pursuing their studies in the high school and at the same time taking an elective course in the university; and we know of no rule or principle upon which a court is at liberty to impose that condition or to enforce that kind of a regulation. The agreement between these two boards might so provide; it is possible that before it was modified it did so provide. It may be that that would have been a fair interpretation of that order. The directors may have so abrogated their authority, or delegated or surrendered it, as to enter into an arrangement of that kind. Whether lawfully may be a very serious question, but it is not presented, because the arrangement under which the university is now carried on seems to be acceptable to the directing parties. The authority in the premises to regulate the school, prescribe the course of studies, and to fix the terms and



conditions upon which students may enter, is placed in the directors, and the terms of the authority are found in Section 4099, Revised Statutes, which says:

“The board of directors may provide all the necessary buildings, books, apparatus and means and appliances, and pass all such by-laws, rules and regulations, concerning the president, professors, tutors, instructors, agents and servants, and the admission, government and tuition of students, as they deem wise and proper; but they may by suitable by-laws delegate and commit the admission, government, management and control of the students, course of studies, discipline and other internal affairs of such university, college, or institution, to the faculty which the directors may appoint from among the professors.”

They are authorized to delegate their authority to the faculty, but not to any independent board of education. As I have said, if the interpretation be put upon this contract that is insisted upon by counsel for the relator, then it would seem that the directors of the university had placed substantially the whole matter of the running of the university in the hands or under the control of the board of education; for it would leave it then within the power of the board of education, if it saw fit, to prescribe that students of the high school should be admitted to take such studies as they pleased, at such hours as they pleased, in the university, and if that were the agreement, it would not be within the power of the directors of the university to successfully resist any such regulation as might be prescribed by the board of education. We do not think that that would be consistent with the provisions or the spirit of this law. The only right expressly given by the statute that the relator has here is the right of free tuition, and that right must be pursued subject to such reasonable and proper regulations as may be prescribed by the directors of the university.

Now it appears that students of the high school in other classes than freshmen B (which corresponds with grade 9—2 of the university), are permitted by the university to elect courses there and also at the same time pursue their studies in the high school; but we do not see that because they have adopted this liberal rule as to all classes excepting grade 9—2, they are thereby required to adopt the same rule as to grade 9—2. They

certainly have a wide discretion in the premises which can not be interfered with by a pupil of the school. The only inconvenience to a patron of the school or scholar in the high school is, that he must wait four months before he can enter the university upon these terms; that is to say, before he may elect certain studies and pursue those and none other.

The purpose of this regulation, as claimed by the relator and confessed by the respondents, is to fill up the university and increase the attendance of those who will take the full four years' course prescribed, and this they believe will be of benefit to the university. Whether the policy is wise or unwise is not a question for this court to consider. We would have no right to interfere with this regulation upon the ground, if it were true, that the policy being pursued is an unwise policy. It is within the discretion of the board. They have a right to do that so long as they do not interfere with some positive right of the relator; and where he seeks the enforcement of a right by mandamus, the right must clearly appear; and that the right is denied must likewise clearly appear.

We are not prepared to say that this discrimination against this particular class in the high school (for it is a discrimination, confessedly) is unreasonable and unjust, and so far a denial of the clear rights of pupils in that class of the high school that a court of equity has a right to interfere by mandamus to compel the university directors to so conduct this school as to wipe out this discrimination; and being of that opinion, the prayer of the relator for a writ must be denied.

*W. H. A. Read*, for relator.

*C. K. Friedman*, for defendants.

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**THE ACT LICENSING STEAM ENGINEERS.**

[Circuit Court of Butler County.]

STATE, EX REL GARD, v. E. H. HARMON, DISTRICT EXAMINER.\*

Decided, 1902.

*Constitutional Law—The Act Licensing Steam Engineers Invalid—Because of the Arbitrary Exemption of a Particular Class.*

Section 4364-891 (94 O. L., 33), providing for the licensing of stationary engineers, contravenes Section 2 of Article I of the Bill of Rights, and Section 36 of Article II of the Ohio Constitution, in that it arbitrarily exempts from its operation those who have been continuously employed as engineers for three years next preceding its passage, and excludes all others not within the time limit therein designated.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

The only objection to the law herein involved, viz.: "An act for the better protection of life and property against injury or damage resulting from the operation of steam engines and boilers by incompetent engineers and others, and to repeal an act therein named" (94 O. L., 33, Sections 4364-891 to 4364-89w, Revised Statutes), which gives us serious consideration is that urged to the provision of Section 7, which reads as follows:

"Section 7. Any engineer who has been employed continuously as a steam engineer in the state of Ohio for a period of three years next prior to the passage of this act, and who files with his application a certificate of such fact, under oath, accompanied by a certificate from his employer or employers, verifying the same, or who holds a license issued to him under any ordinance of a municipal corporation of this state, shall be entitled to a license without further examination."

It is contended that this section arbitrarily exempts from the requirements of the act a large, fixed, particular number of engineers who would naturally belong to the class sought to be regulated by the general provisions of the law and hence is in contravention of Section 2, Article I of the Bill of Rights, and Section 26, Article II of the Constitution.

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\*Affirmed by the Supreme Court (66 O. S., 249).

The particular engineers who can substitute three years' continuous employment in lieu of an examination are fixed once and for always by the passage of the act. They are those who have been continuously employed as engineers between March 1, 1897, and March 1, 1900, and none other. Here is a particular class marked off by an arbitrarily fixed time limit from the general class, and into this particular class no one thereafter can ever enter. A little reflection will make apparent that this particular class is large.

There is no objection within the legislative wisdom to making three years' continuous employment the equivalent of an examination, but the privilege of tendering this equivalent must not be given to a particular set of engineers.

The Supreme Court said, per Spear, C. J., in *State v. Gardner*, 58 Ohio St., 599, 610:

"Our Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and Section 26 of Article II of the Constitution requires that all laws of a general nature shall have a uniform operation throughout the state. A statute, therefore, which imposes special restrictions or burdens, or grants special privileges to persons engaged in the same business under the same circumstances, can not be sustained because it is in contravention of the equal right which all are entitled to in the enforcement of laws, and in the enjoyment of liberty, and in the enjoyment of an equal right in the acquisition and possession of property, and so is not of uniform operation.

"The constitutional objection to this statute is that it operates unequally in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class, pursuing the same business in the same way."

Also see *State v. Gravett*, 65 Ohio St., 289.

At first we considered declaring Section 7 invalid and letting the remainder of the law stand, but the exception of Section 7 is so large that it affects the scope of the whole law.

The General Assembly may not have legislated on the subject at all had it realized that it could not make the exceptions provided for in Section 7.

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We do not think the Fourteenth Amendment of the Federal Constitution applies to this subject matter.

The other objections to this law are not, in our opinion, well taken. We are of opinion that this law is invalid.

Demurrer to petition overruled.

*J. M. Sheets*, Attorney-General and *S. W. Bennett*, for the demurrer.

*Warren Gard*, *Wm. M. Ampt* and *James E. Neal*, against the demurrer.

### INJUNCTION AGAINST RAILWAY TICKET BROKERS.

[Circuit Court of Cuyahoga County.]

JOHN M. KINNER ET AL V. LAKE SHORE & MICHIGAN SOUTHERN RAILROAD CO.\*

Decided, February 10, 1902.

*Railways—Combination of to Maintain Fares—Can not be Attacked Collaterally as Unlawful—In a Suit to Enjoin Ticket Brokers from Dealing in Non-transferable Tickets—Application of the Maxim as to Clean Hands—Public Policy—Injunction—Contracts.*

1. The maxim as to coming into court with clean hands is only applicable to misconduct in regard to or connected with the matter in litigation in such a way that it affects the equitable relations subsisting between the two parties and arising out of the transaction; it does not extend to misconduct, however gross, which is not connected with the matter in litigation and with which the opposite party has no concern.
2. The question of the legality of a combination of railroads, known as the Central Passenger Association, having as its purpose the fixing of passenger fares within a given territory, can not be determined in a suit to enjoin ticket brokers from selling certain limited non-transferable tickets; and such a combination whether lawful or otherwise does not so affect and taint the contract between one of the companies composing the combination and its passengers, that a court of equity will refuse to enjoin ticket brokers from doing with these tickets what they acknowledge to be unlawful.

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\*Affirmed by the Supreme Court (69 O. S., 339).

3. But a court of equity, unless the contract under consideration is itself unlawful and against public policy, will grant relief by way of injunction to restrain one who is not a party to the contract from seeking to induce others to violate the contract, to accomplish which they must do a wrong that is an offense to a court and amounts to a crime.
4. Where the use of railway tickets by others than the original purchasers can only be effected by fraudulent representations, a court of equity will enjoin brokers from inducing purchasers to buy non-transferable tickets, issued by a railway company in combination with other companies under a passenger association agreement.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Heard on error.

A petition was filed in this case in the court of common pleas by the defendant in error to restrain John M. Kinner and others who are known as ticket brokers in the city of Cleveland from dealing in certain tickets issued by it to persons who were attending the encampment of the Grand Army of the Republic in the city of Cleveland in the month of September, 1901.

The tickets issued by the railway company were for round trips to Cleveland and to a return from the place of starting, and they were made non-transferable and were good only in the hands of the person to whom they were issued, and no other person could use the same except by fraudulently and unlawfully representing himself to be the one named in the ticket, and the party to whom the ticket was issued had entered into a contract evidenced by the ticket wherein he agreed to do all he could to further the intent and purpose of the railway company in issuing the same, and to this end, that he would not transfer it nor use it for any purpose other than that for which it was issued. Many persons attending the encampment by means of such tickets, after coming to Cleveland, undertook to dispose of the same to the plaintiffs in error, and the plaintiffs in error were about to sell and were selling the same to persons to be used upon the railroad of the defendant in error. And, from thus unlawfully dealing in these tickets, this action was instituted and an injunction obtained from the court restraining the plaintiffs in error from dealing in the tickets as above set forth.

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These tickets constituted limited contracts, not transferable, and good only in the hands of the original purchaser. They were also limited as to the time of their use. They could not be used earlier than September 8, 1901, nor later than September 12, of the same year, unless certain arrangements were made in Cleveland through the agent of the railway company, who had power upon the performance of certain conditions stipulated in the tickets to extend the time within which the tickets could be used for a return passage, and, in accepting the ticket, the person agreed to be governed by all the conditions as stated, in the contract; and the tickets had marked upon them, "Account of the Grand Army of the Republic, National Encampment."

First, a motion was made by the defendant below, to vacate the restraining order granted upon the petition, which motion was overruled, and thereupon the plaintiff in error answered in that court, and the matters set forth in the answer, so far as necessary to speak of them here, are:

First. The plaintiff was engaged in a fraudulent conspiracy, and that the action brought in the petition was in the furtherance thereof.

Second. That the railway company has no standing in a court of equity by reason of the illegal acts which this suit is brought to protect and execute.

The acts of conspiracy on the part of the railway company are set out in great detail in the answer. Briefly stated, they are: That the railway company in this case, in conjunction with about twenty other railroad companies, entered into a combination and conspiracy for the purpose of suppressing competition among themselves in the business of transporting passengers to and from the encampment. That this was accomplished through what is known as the "Central Passenger Association," and that this association had its office in Chicago; that said association was composed of certain railroads of which the Lake Shore & Michigan Southern is one; and that this association had meetings by agents and representatives of all the companies parties thereto, including an agent and representative of the defendant in error, and that, at such meetings, rates had been fixed and forms of tickets had been agreed upon to be issued

by all the companies to such combination, for the purpose of transporting passengers to and from the city of Cleveland during the said encampment of the Grand Army of the Republic.

Various acts are set out in the answer, done by these companies in furtherance of this unlawful combination, and it is then pleaded that the association of these railroad companies is contrary to the laws of the United States and the state of Ohio; and that all the acts and things done by it in furtherance of the general illegal and unlawful design of the combination, are illegal and ought not to be protected or furthered by the aid of a court of equity.

When the case came on for trial in the court below, the plaintiffs in error put on a witness who was asked many questions in regard to the way in which the Central Passenger Association is made up and in regard to its purposes and rules and regulations and various other matters pertaining to it and tending to connect the Lake Shore & Michigan Southern Railway Company with the Central Passenger Association. Each of these questions was objected to, and the objections were sustained, and counsel for the plaintiffs in error stated in the record what answers would be made to the questions if permitted to be answered, and the statements are responsive to the questions asked.

The sole question made in this action is, whether or not the defendant in error as a member of a combination of railroad companies which had for its object the suppression and competition in violation of the federal statute in such case made, and whether the defendant in error can appeal to a court of equity to protect tickets issued by it of the kind, character and from agreed by said combination to be issued and, after issued, in danger of being fraudulently misused; or, in other words, had the defendant in error such a standing in a court of equity? Were its own hands so clean that a court of equity would intervene to protect it and the contracts or tickets issued by it?

It appears from the record in the case, that whatever was done by the combination known as the "Passenger Association," that the tickets issued and under consideration in this case were issued by each railroad separately, and that the contract of the passenger was with the road over which he took passage and



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with no other road, nor was his contract with the passenger association.

The plaintiffs in error insisted that they were not urging that the defendant in error can not be heard in a court of equity because it is a member of this illegal conspiracy, but for the reason that the tickets which it seeks to protect by the aid of a court of equity are themselves the subject-matter of an illegal agreement, each individual ticket being the product and result of, and in furtherance of, the agreement made between the defendant in error and the other roads.

Nor do the plaintiffs in error contend that these tickets are void as contracts between the railroad companies and purchasers. They are sold for a valuable consideration, and are agreements on the part of the railroad company to perform services in return for the money received and that the purchaser may insist upon the performance of that service, and the railroad company can not set up its own wrong to avoid the contract; and they insist that the contention could not be raised with regard to the ticket as a contract between the vendor and the purchaser.

They admit that their act was unlawful in that they were attempting to induce the ticket holders to break the contract which he had with the railroad company, and to accomplish the end sought, it became necessary that they should induce the person to whom they would sell the ticket to commit a fraud upon the railroad company by representing himself to be the person named in the ticket.

The plaintiffs in error do not seek to attack in a legal sense the Central Passenger Association in this proceeding; but say that, in order to accomplish that end, an action would have to be commenced and prosecuted as in *United States v. Joint Traffic Assn.*, 171 U. S., 505 (19 Sup. Ct. Rep., 948), and in *United States v. Freight Assn.*, 166 U. S., 290 (17 Sup. Ct. Rep. 540), and that they are here not seeking the relief that was obtained in those cases on behalf of the United States but they have narrowed their contention to the claim that if the defendant in error is engaged in an enterprise obnoxious to the federal statute, and the tickets here issued are sought to be protected as in furtherance of that enterprise, it can not ask the protection of a court

of equity, and, on this ground alone, it is claimed that the injunction allowed is contrary to law, and that is the question before the court.

It is not necessary to cite authority to the point that a court of equity will not protect the subject-matter of an illegal contract and will not enforce an illegal contract.

The question, then, as we understand it, is this: A number of railroads furnish each a member of an association, which association, it is claimed, is organized for the purpose of keeping up passenger rates and stifling competition, and, hence, is against public policy and contrary to the anti-trust law passed by the congress of the United States in 1890; and that that association took some action in regard to the amount that should be charged for tickets from various states along the line of the railroad to persons attending the encampment. It is not shown, however, that the association went into such detail, nor that it did anything more than to determine that the persons attending the encampment should have passage thereto and return for one fare; and that, after such association, each railroad for itself made terms and sold the tickets for the round trip for one fare; and after the persons who bought the tickets arrived in Cleveland, the plaintiffs in error undertook to buy the tickets for the return trip contrary to the terms of the contract and in fraud of the defendant in error and illegally and unlawfully; and, thereupon, the defendant in error obtained an injunction against their so dealing with these tickets.

Under these facts, will a court of equity refuse the defendant in error relief against such unlawful dealing?

The defendant in error relies almost wholly upon the case of *Delaware, L. & W. R. R. Co. v. Frank*, 110 Fed. Rep., 689, in the United States Circuit Court for the Western District of New York.

That case is the one wherein the railroads made special terms to persons attending the Pan-American at Buffalo. It appears that the combination there made was, that the railroads agreed to pool their roads and their earnings upon such tickets and, at a time, divide the proceeds upon some basis determined by the association. In that regard the case differs from the one under consideration.

The defendant in error cites us to a case decided in San Francisco about the same time that Judge Hazel decided the case at Buffalo, and the cases seem to be at variance with each other. In the San Francisco case an injunction was issued restraining scalpers from dealing in Epworth League excursion tickets, and in seeking dissolution of the order, the scalpers' attorney urged that the railroad company did not come into the court of equity with clean hands, and that its combination with the other competing railroads by which the Epworth League scheme was brought about, was in violation of the provisions of the Sherman act by which it was made unlawful for competing railroads to fix rates; and it was urged that on this account, the tickets being themselves unlawful, the railroad could not restrain any one from dealing in them. We have not seen this case reported in any law report, but have been referred to a notice of the same, and in the notice it seems that Judge Murasky decided the case, saying that the rule requiring persons to enter a court of equity with clean hands applies equally to plaintiffs and defendants; and that the defendant, by his own affidavit, showed that he himself was engaged in an unlawful business which involved deceit, false personation and forgery, and that he who asks the court to relieve his shoulders of the burden of an injunction upon any other ground than lack of jurisdiction, is expected to deny the equities of the bill and not to disclose an utter absence of right on his part.

*Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. Rep., 65, is a case much like the one before us, where the injunction was allowed.

In *Baltimore & O. S. W. R. R. Co. v. Broome*, in the Superior Court of Cincinnati, an injunction was granted July 9, 1901, the occasion being the Christian Endeavor convention.

The maxim of coming into court with clean hands is confined by courts of equity to misconduct in regard to or connected with the matter in litigation, so that it affects the equitable relations subsisting between the two parties and arising out of the transaction. It does not extend to any misconduct, however gross it is, unconnected with the matter in litigation and with which the opposite party has no concern.

A court of equity will not shut its doors to the wicked and to those who are guilty of violation of law, simply because of the moral state of the person, but will confine the maxim to where the wrong-doing has directly affected the particular matter under consideration by the court. There is no contention in this case as to this matter between the parties hereto. The real question is: Does the illegal contract, set up in the answer, so affect and taint the contract between the railroad company and its passenger that a court will refuse to restrain the plaintiffs in error from doing what they acknowledge to be an unlawful thing.

In *Strait v. Harrow Co.*, 51 Fed. Rep., 819, where a suit was brought to enjoin the infringement of a patent, the court say, on page 819:

“Such a combination may be an odious and wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters-patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it, by its title to the letters-patent, is a novel one, and entirely unwarranted.”

Further on, quoting now again, the court say:

“If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property.”

In *Bonsack Mach. Co. v. Smith*, 70 Fed. Rep., 383, the plaintiff sued for an injunction against the infringement of a patent, and the defendant set up the conduct of the plaintiffs in attempting to obtain a monopoly, and the court held that it was no defense.

*The Charles E. Wisewall*, 74 Fed. Rep., 802. In this case, the defendants undertook to avoid payment of tonnage charges, on

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the ground that the complainant was a member of an association illegal under the Sherman anti-trust act. The language of the court is directly to the point under consideration and is to the effect that the answer was not well taken.

The purchaser of the ticket, having received compensation in part, and the railroad company being ready to fulfill the entire contract, and having dealt with the railroad company in regard to the ticket, he can not take the benefit of his bargain without paying the consideration. He can not receive the benefits of his contract without fully complying with the same himself.

*Dennehy v. McNulta*, 86 Fed. Rep., 825, 827. The court say that—

“The mere fact that the corporation as one of the contracting parties may constitute an unjust monopoly, \* \* \* can not serve *ipso facto* to create default or liability on its contracts generally; nor can such fact be invoked collaterally, in any manner to affect in any manner its independent contract obligations or rights.”

*LaFayette Bridge Co. v. Streator (City)*, 105 Fed. Rep., 729.

These cases are to the effect that the illegal combination of the railroads can not be drawn into a suit in a collateral way; and that the relation between the railroad company and the ticket broker is so far foreign to the action of the passenger association, that it will not avail the plaintiffs in error in this case.

There are many cases cited in the brief of defendant in error which establish the point that courts will refuse to apply this maxim that a person must come into court with clean hands, for the benefit of persons seeking to evade a law. *Chicago v. Stock Yards Co.*, 45 N. E. Rep., 430; *Meister v. Alber*, 36 Atl. Rep., 360 (85 Md., 73-84); *Lew's & Nelson's Appeal*, 67 Pa. St., 153, 166; *Mossler v. Jacobs*, 66 Ill. App., 571; *United Protestant E. G. Congregation v. Stegner*, 21 Ohio St., 488; *Norton v. Blinn*, 39 Ohio St., 145; *National Distilling Co. v. Importing Co.*, 56 N. W. Rep., 864 (86 Wis., 352, 355); *Sylvester v. Jerome*, 34 Pac. Rep., 760 (19 Col., 128).

These cases and many others that we have examined establish these propositions:

First—The unlawful combination between the railroad companies can not be tried and determined in this action.

Second—If that combination is unlawful and contrary to the anti-trust law of the United States, still the act of that association is not so directly connected with the contract under consideration that a court of equity will refuse to grant the defendant in error equitable relief.

Third—Unless the contract under consideration is itself unlawful and against public policy, a court of equity will grant relief by way of injunction to restrain one who is not a party to the contract but who is seeking to induce others to violate the same, and to accomplish that end must do a wrong that is offensive to a court of equity and which amounts to a crime.

These conclusions being reached, it is clear that the plaintiffs in error are not entitled to have the judgment below reversed, and the judgment is affirmed.

*Foran, McTight & Baker*, for plaintiffs in error.

*Brewer, Cook & McGowan*, for defendant in error.

### ACTION ON GUARDIAN'S BOND.

[Circuit Court of Lucas County.]

ALVINA A. WEGNER v. JOHN L. WILTSIE ET AL.

Decided, February 7, 1902.

*Guardian and Ward—Bond of Guardian—Action on Accrues, when—Jurisdiction—Conclusions of Law and of Fact—Pleading.*

1. No cause of action accrues in favor of a ward on the bond of his guardian until final settlement and adjudication of the account of the guardian in the probate court.
2. The death of the guardian without filing an account, and leaving no books of account or memoranda from which his indebtedness to the estate can be ascertained, does not give the common pleas court jurisdiction on the bond of the guardian to compel an accounting and payment to the ward of the amount found due him.
3. An allegation that under such circumstances the jurisdiction of the probate court is ineffectual for the purpose of obtaining an accounting, states a conclusion of law and not of fact to be taken as admitted on demurrer.

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HULL, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding in error to reverse the judgment of the court of common pleas entered against the plaintiff upon a demurrer to the third amended petition, demurrers having been sustained to the petitions theretofore filed.

The action is founded on a guardian's bond, and the petition sets forth in the first cause of action that:

"On November 21, 1896, Herman Baumbach was duly appointed by the Probate Court of Lucas County, Ohio, guardian of the property of the plaintiff, then fourteen years of age; that said Baumbach as such guardian entered into a bond as required by law, in the sum of \$5,000, with Charles Hanner and J. L. Wiltsie as sureties, which said bond was duly approved by said court, and under the terms and conditions of which bond the said Charles Hanner and John L. Wiltsie were and are jointly and severally liable; that said bond was upon the condition that said Baumbach as such guardian should discharge with fidelity the trust reposed in him, and render an accurate statement of his transactions, with a just account of the profits arising from the real and personal estate of his said ward, and deliver up the same to the court, when thereunto required, a copy of which bond is hereto attached, marked exhibit 'A.'

"There came into the possession and custody of said Baumbach as such guardian the sum of \$22,500 in money, which belonged to and was the property of this plaintiff. Said Baumbach continued to act as such guardian and to administer said trust until on or about August 15, 1898, when he died, and in a short time thereafter, John N. Magee was duly appointed and qualified as guardian of the person and property of plaintiff, continuing to administer said trust until the plaintiff became of the age of eighteen years, to-wit, on March 26, 1900.

"On August 25, 1898, John E. Parsons was by the probate court of said Lucas county duly appointed and qualified as administrator of the estate of said Herman Baumbach, deceased, which estate then was and still is wholly insolvent. Said administrator filed his final account and was discharged by the probate court on or about June 8, 1899, without being able to acquire information by which he could settle up the account of said Baumbach as such guardian, although diligent and protracted search was made by said administrator to obtain the necessary information, there being an entire absence of books or papers that would enable him so to do; but as such adminis-

trator said Parsons delivered to said Magee, as such guardian, one promissory note of \$400, one promissory note of \$200 and \$12.60 in cash then remaining in bank to the credit of said guardianship estate, which property was all that said administrator was able to discover belonging to said estate of the plaintiff. Said Magee, as said guardian, has filed his final account setting forth his dealings with respect to said property so coming into his hands from said Parsons, and such account has been duly approved and confirmed and said guardian discharged.

"Plaintiff avers that out of or from the said \$2,500 received as aforesaid by said Baumbach, she has not been paid nor has she received the benefit, either directly or indirectly, of more than the sum of \$1,362; and that said Baumbach failed to faithfully perform his duties and discharge with fidelity the trust committed to him, in that between July 2, 1897, and March 31, 1898, he wrongfully converted to his own use the remainder of the said property coming into his hands as such guardian.

"By reason of the negligence of said Baumbach, and his omission and failure to provide himself with proper books or memoranda, and for other reasons not known to this plaintiff, no account, either partial or final, was ever prepared or filed in said probate court by him in relation to said guardianship property; nor has this plaintiff, or any one in her behalf, been able, after diligent search, to discover any books, papers or other information which would show an accurate statement or the detailed transactions of said guardian, and an accounting can not be obtained from or with said guardian in the exercise of the power and jurisdiction of said probate court in respect to said estate, and such jurisdiction is ineffectual for that purpose."

Then follows a second cause of action, setting forth that Charles Hanner, one of the bondsmen, carried life insurance to the amount of several thousand dollars, with several life insurance companies that are named, the life insurance being in favor of his wife and children—some in favor of his wife and some in favor of the children. And it is claimed that under Section 3628, Revised Statutes, plaintiff is entitled to have a certain amount of this life insurance subjected to her claim, it being in excess of the amount that could be carried as against creditors, under Section 3628, Revised Statutes, as it then stood. And plaintiff prays that these defendants be required to answer and disclose the amount of life insurance carried upon the life



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of said Charles Hanner, and a number of interrogatories are attached to the petition upon that subject; and asks "that an accounting may be had of said trust property in the hands of said Herman Baumbach, as aforesaid, and of his dealings with respect thereto as such guardian, and that the plaintiff may have judgment for the amount found due her, with interest thereon from March 1, 1898; that the amount of the liability of said Charles Hanner on said guardianship bond be determined; that an accounting may be had as to said life insurance upon the life of said Charles Hanner, deceased, and the annual premiums or payments therefor; that the amount of each of the insurance premiums and annual payments or cost aforesaid be added together, and that only such portion of all of said insurance as the sum of \$150 will bear to the whole of such annual premiums and payments be declared to belong to said beneficiaries, within the meaning of Section 3628, Revised Statutes, and that the residue of such insurance (or so much thereof as may be necessary) be ordered paid over to the plaintiff to be applied to the payment of her said claim and the liability of said Charles Hanner on said guardianship bond. And for such other and further relief in the premises as the nature of the case may require and as in equity may seem meet and proper."

To this third amended petition was filed a demurrer on the grounds:

First. That the plaintiff is without legal capacity to sue.

Second. That several causes of action are improperly joined.

Third. That separate causes of action against several defendants are improperly joined in said amended petition.

Fourth. That said amended petition does not state facts sufficient to constitute a cause of action against this defendant.

The demurrer was sustained by the common pleas court, as demurrers had been to the preceding petitions, and the plaintiff not desiring to plead further, judgment was rendered against her. And this is the judgment that is sought to be reversed in this court.

The claim on the part of the defendant in error, coming first to the fourth ground of demurrer, is that the petition does not state facts sufficient to constitute a cause of action, for the reason

that it does not show either that Herman Baumbach filed a final account as guardian of plaintiff and had that account passed upon and settled by the probate court, or that his administrator, John E. Parsons, ever filed such account with the probate court, or had any settlement thereon, or any adjudication of the probate court as to the amount due from Herman Baumbach, as her guardian, to plaintiff.

The claim is that no cause of action would accrue to the plaintiff until final settlement was had with the probate court, and adjudication of this account was had in that court. It is claimed by the plaintiff in error that if the allegations contained in the amended petition are true, as is admitted upon demurrer, it was impossible to have an accounting and settlement in probate court, and that in the language of the pleading, "an accounting can not be obtained from or with such guardian in the exercise of the power and jurisdiction of said probate court in respect to said estate, and such jurisdiction is ineffectual for such purpose," and therefore it is urged by counsel for plaintiff in error, that the plaintiff had a right to file her petition in the court of common pleas without first having a settlement and accounting in the probate court, and that she may have an accounting in the court of common pleas with these defendants, and the amount due her determined, and that she may recover judgment, and that they should be required to account to her for the excess of life insurance.

Section 524, Revised Statutes, providing for the jurisdiction of the probate court, provides, among other things, that—

"The probate court shall have exclusive jurisdiction, except as hereinafter provided: \* \* \* to appoint and to remove guardians, to direct and control their conduct and settle their accounts."

Unless this is a case where there can not be an accounting in the probate court, or can not be an accounting within the exercise of the power and jurisdiction of the probate court, then it is not a case where such an action can be maintained in the court of common pleas, for the probate court has exclusive jurisdiction of these matters.

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There has been several decisions of the Supreme Court on this question. A case cited by counsel for plaintiff in error is found in *Bricker v. Elliott*, 55 Ohio St., 577, where it is held, as laid down in the syllabus:

“A suit to compel a trustee to account to the beneficiaries of his trust and for a judgment for the amount which, upon such accounting, may be found in his hands, is not an action for the recovery of money only; and from the judgment of the court of common pleas in such action either party may appeal to the circuit court.”

The only question decided in this case was that in such an action either party may appeal to the circuit court, and this was an action against a trustee to compel him to account to the beneficiaries, and not an action upon a guardian's bond. On page 580 of the opinion, which was rendered by Judge Shauck, the court say:

“In the original petition the plaintiff did not allege an indebtedness for a definite amount due from the defendant. He alleged facts which excused him from doing so, by showing that, although the parties were adversary in the suit, they had not been so in the transaction out of which it arose.”

It is not necessary to discuss the facts in this case. It was a suit brought against a man who had been acting as a trustee for his mother and it was brought by her administrator, requiring him to account for money and property that came into his hands. This authority is hardly applicable to the question before us now, which is whether this action can be brought against the bondsmen of Herman Baumbach, as guardian of this plaintiff, for an alleged default in the guardian's bond before there has been a settlement in the probate court, and that court has found and adjudicated the amount due from Baumbach to his ward.

*Newton v. Hammond*, 38 Ohio St., 430, it seems to us, is in point and decisive. A portion of the syllabus in the case is:

“The jurisdiction of probate courts over the settlement or such accounts is exclusive.

“A right of action on a guardian's bond to recover from the sureties the amount remaining in the hands of the guardian, first accrues to the ward when such amount is ascertained by the probate court on the settlement of the guardian's final account.”

And the court say, on pages 434 and 435 of the opinion :

“The plaintiffs in error contend that ‘the right of action’ of the plaintiff below first accrued to him at his majority, at which time he undoubtedly had a right to compel his guardian, by judicial process to perform his duty, to-wit, to make final settlement and payment. We hold, that the ‘right of action’ meant by the statute is the right to prosecute a suit on the cause of action therein stated, and, as applied in this case, means a suit on the guardian’s bond. The right to sue on the bond, and the right to compel the guardian to render a final account are very different rights. The latter can be enforced only in the probate court, while that court has no jurisdiction over the former. Section 2 of the probate act (S. & C., 1212) gives to the probate court exclusive jurisdiction: ‘To appoint and remove guardians, to direct and control their conduct, and to settle their accounts;’ and by Section 1, Clause 4, of the act of March 26, 1872 (69 Ohio L., 50), it is made the duty of every guardian, ‘at the expiration of his trust, fully to account for, and pay over to the proper person, all the estate of his ward remaining in his hands.’ That the settlement of this final account is within the exclusive jurisdiction of the probate court is not disputed, but the claim of the plaintiff in error is, that the failure to make the account, and pay over the estate remaining in his hands, at the expiration of the trust, is a breach of the bond, for which a right of action immediately accrues to the ward. And in support of this claim, *State v. Humphries*, 7 Ohio (pt. 1), 223, is relied on, in which it was held that a previous settlement of the accounts of a guardian was not necessary to an action on his bond. In that case, however, it was admitted that it had been settled by adjudication, \* \* \* that an action on an executor’s or administrator’s bond would not lie until after settlement of accounts, in the absence of a statute on the subject, yet, as the Legislature had subsequently adopted the rule as to executor’s and administrator’s bond, without including guardians, it was therefore held that an action on a guardian’s bond might be maintained without a previous settlement of his accounts, in accordance with a practice which had obtained in respect to other official bonds; namely, in respect to an insolvent’s bond and a clerk’s bond (3 Ohio, 508; 6 Ohio, 150), cases in which no accounting was required by statute. But *Bartlett v. Humphries* is of little or no weight on the question now under consideration, for, as we have shown by reference to the act of March 26, 1872, every guardian is now required at the expiration of his trust to file a final account in the probate court, ‘fully to account for and pay over;’ that is, to account first, so

that the amount in his hands may be judicially ascertained, and then pay over, etc.

"The settlement made in the probate court of the accounts of the guardian shall be final between him and his ward, unless an appeal be taken to the court of common pleas, or the same be set aside for fraud or manifest mistake. Section 31 of Guardian's Act (S. & C., 677), and Section 33 of the same act provides: 'When any guardian has died, or may hereafter die, before the settlement in court of his or her guardianship account, it shall be the duty of the executor or administrator of such guardian to settle up said account in the same manner as such guardian ought to have done.'

"If an accounting can not be obtained from the guardian in the exercise of the power and jurisdiction of the probate court, we do not deny that an action on the bond against the makers may be prosecuted in a court of equity for an account and other relief; otherwise, such final accounting being a duty enjoined by law, and the enforcement of it being entirely within the jurisdiction of the probate court, a jurisdiction declared by statute to be exclusive, and that court performing a judicial function in finding the balance due upon such accounting under the power conferred upon it by statute, no action will lie against the guardian and his sureties on his bond for a breach thereof, for any balance due from the guardian to his late ward in a court of law, until such balance shall have been fixed by final settlement in the probate court.

"That an accounting must precede judgment is clear from the fact that the amount of the judgment can not otherwise be ascertained. Exclusive jurisdiction in the settlement of the account is given to the probate court. The probate court has no jurisdiction in an action on the bond."

This case and one or two other cases seem to decide clearly and finally that unless the jurisdiction of the probate court has been ousted in some way, or it is impossible to settle the matter within the jurisdiction of the probate court, an action can not be maintained upon the guardian's bond until there has been a settlement and adjudication of the amount due in the probate court.

*Gorman v. Taylor*, 43 Ohio St., 86, paragraph three of the syllabus is as follows:

"A suit in equity on a guardian's bond, to compel an account can not be maintained without a showing that the powers and

jurisdiction of the probate court are ineffectual to secure such accounting.”

And it is held in *Braiden v. Mercer*, 44 Ohio St., 339, that the settlement in the probate court is conclusive and final against the sureties. The syllabus is:

“In an action upon a guardian’s bond for the recovery of the amount found due the ward upon a final settlement of the guardian’s accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts.”

It is sought to avoid these decisions of the Supreme Court and the law as therein established by the allegations in the amended petition that Baumbach kept no books or memoranda of accounts whereby it could be ascertained how much was due from him to his ward, and therefore it was impossible to compel any account or have any settlement of Bumbach’s account; and the further allegation, “that an account can not be obtained from or with said guardian in the exercise of the power and jurisdiction of the probate court with respect to said estate, and such jurisdiction is ineffectual for that purpose.” This last averment is purely a conclusion of law. It is not an allegation of fact to allege that the probate court is without jurisdiction or that an accounting can not be had within the exercise of the power and jurisdiction of that court, or that such jurisdiction would be ineffectual; it is necessary to plead facts to show that that is the case.

We are of the opinion that the first cause of action in this petition does not state facts sufficient to constitute a cause of action; and if the first cause of action falls, the second must fall, for it is based upon it. And there is in fact but one cause of action. That is the claim which plaintiff has against the bondsmen and their representatives. The fact that Baumbach kept no books or accounts and left no memoranda behind him did not oust the jurisdiction of the probate court. It might make it more difficult to ascertain in what amount if any he was indebted to his ward, but it would not affect the jurisdiction of the court or render the jurisdiction of the court ineffectual, and it would

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be no more difficult to ascertain in the probate court in what amount he was indebted to his ward than it would be in the court of common pleas or in this court. It would be a matter of accounting, a matter to be determined by the court from such evidence as could be offered, such papers and memoranda as could be found; and the adjudication of the probate court upon this question, as decided by the Supreme Court, would be final as against the surety in the absence of fraud or mistake or collusion.

We are unable to see how these allegations in the petition to which reference has been made take the case out of the rule established by these decisions of the Supreme Court, or afford any substantial reason or ground why an accounting should not be had in the probate court and this matter determined there. It is not necessary to state or discuss the rules of law or evidence that would apply in a hearing of that kind. The whole matter is within the exclusive jurisdiction of the probate court. There has been no settlement or finding or adjudication of that court fixing the amount due from Baumbach to his ward, and the court of common pleas had no jurisdiction to require an accounting and settlement or make a finding thereon.

Being of this opinion as to this branch of the case, it is not necessary to discuss the second claim of the plaintiff that the life insurance in a certain amount should be applied to plaintiff's claim. If plaintiff can not maintain her action against Baumbach's bondsmen, for the breach of the guardian's bond, she of course is not entitled to an accounting against the children and the widow of the bondsman Hanner for the excess of life insurance.

We are of the opinion that the court of common pleas was right in sustaining the demurrer. Holding as we do, that the petition does not state facts sufficient to constitute a cause of action, it is not necessary for us to discuss the other grounds set up in the demurrer.

For the reasons stated, the judgment of the court of common pleas is affirmed.

*George A. Bassett*, for plaintiff in error.

*Kinney & Newton*, for Louis Hanner et al.

## EVIDENCE OF INTENT.

[Circuit Court of Jefferson County.]

WILLIAM COLES V. STATE OF OHIO.

Decided, November Term, 1901.

*Criminal Law—Intent a Substantive Part of the Offense, When—Reviewing Court will Consider Quantum of Proof—As to Compelling a Defendant to Be a Witness against Himself—By Exhibiting Himself to the Prosecuting Witness.*

1. The intent in a trial under an indictment charging assault to rob and assault to rape in two counts, is a substantive part of the offense, and must be established beyond a reasonable doubt.
2. Where a woman is struck from behind with a piece of gas pipe, the intent to wound is manifest, but it does not follow that no other purpose existed; and where she carried a gold watch and chain, which could be plainly seen in her belt, and there was no ill feeling between herself and her assailant, and the blow was struck in a dark place away from the street lights, a reviewing court in considering the quantum of proof necessary to convict will uphold a verdict of guilty of intent to rob.
3. It is not a violation of the constitutional provision, that no person shall be compelled in a criminal case to be a witness against himself, for the trial judge to require him, over the objection of his counsel, to stand up for better identification by the prosecuting witness.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Heard on error.

Two questions are made in this case by counsel for plaintiff in error:

First. That the verdict is not sustained by the evidence.

Second. That the action of the court upon the trial, by which the accused was compelled to stand up for the better inspection of his person by the prosecuting witness, was a prejudicial violation of his constitutional privilege and rights.

Upon the first proposition the special complaint of counsel is that the evidence was not sufficient to show the intent.

The accused was charged in the indictment with assault with intent to rape and with assault with intent to rob. The jury convicted of assault with intent to rob. In determining the



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question, we concede the correctness of the claim of counsel that the intent in a case of this character is a substantive part of the offense, and that, in order to convict of the higher offense, the intent must be established beyond a reasonable doubt; and that, in reviewing the judgment of the lower court upon this question, this court must take into consideration the amount of proof necessary to work a conviction; and if the verdict is clearly against the weight of evidence, taking into consideration the amount of proof required in a criminal case, then the action of the lower court in rendering judgment upon the same should be reversed.

Under this rule, was the evidence sufficient to show the intent? Coles was standing on the corner of Adams and Fifth streets when the prosecuting witness came up Adams street and turned down Fifth street southwardly. He immediately followed her, and when she got to the gate or close to the gate of her home, about half way down the square, struck her upon the head with a piece of gas pipe, stunning her; but she did not entirely lose consciousness, and screamed three times. Coles immediately desisted and ran up an alley immediately opposite the place of assault and out to his own home. The prosecuting witness had a gold watch and chain upon her person, the watch being in her belt, the place where she ordinarily carried it, and where it could be plainly seen. She had gone to her home in the same direction from her work, three or four squares away, for several months previously, two or three times a day. Coles was a resident of the city and had been all his life and lived a few squares from where the prosecuting witness lived. He is a negro about eighteen years of age, and she a white girl twenty-four or five years of age. There is no evidence of any grudge; indeed, she did not know Coles. Simon Loftus was about a square away and heard her scream and immediately ran to her rescue, but did not see Coles in his flight. When he got to her she was leaning over the gate partially unconscious. Nothing was disturbed upon her person.

Were these facts sufficient to justify the jury in rendering a verdict of guilty with intent to rob. We think they were.

The accused must have had some intent in striking the girl, beyond the malicious purpose of injuring her. It is true that, in striking her with a piece of gas pipe, the natural conclusion is that he intended to kill or at least wound her; that intent follows and is presumed from the use of such a weapon. It may be contended that his purpose was to wound her, but it does not follow that he had no other purpose; or that the wounding of her was not to accomplish the ultimate purpose to rape or rob. There is nothing illogical in holding that both intents were in his mind, the one being necessary to accomplish the other. It is hardly conceivable that he struck her for the purpose of wounding alone. There was no motive at all for simply wounding her; no ill feeling; no quarrel; nothing of that character. Why, therefore, did he follow her down the street, out of the glare of the electric light and secretly strike her with the weapon? It could only be for the purpose of rape or robbery; the jury found the latter, and we think from the evidence they found correctly.

The next question is a more difficult one. During the examination of the prosecuting witness, while upon the stand in her direct examination, the following took place:

Prosecuting Attorney Lewis: "State if you could recognize the person who struck you there as he was running away from you.

"A. No, sir, I could not.

"Lewis: Stand up, Coles (speaking to the defendant). Turn your back to the witness.

"Defendant objects to this.

"Court: I think that is all right.

"Mr. Erskine (Attorney for Coles): We object to that.

"Court: He may remain standing a minute.

"To this the defendant then and there excepts.

"Witness: The size of that man fills the bill.

"Court: The answer is stricken out.

"Erskine: We object to the order of the court to have the defendant stand up. (Overruled; to which ruling of the court the defendant then and there excepted).

"Q. Now state to the jury whether the person that you saw running, how he compared, if at all, with the person of the defendant? (Objected to; sustained).

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"Court: Let her state her recollection of his size.

"Q. State as to whether the person you saw was taller or shorter or the same size as the defendant. (Objected to; sustained).

"Court: Let her state what kind of a man he appeared to be.

"Q. State?

"A. He was a short man, and the size of that man fills the bill.

"Court: The latter part of the answer is stricken out; the jury will pay no attention to that remark."

From these proceedings it will be seen that the accused, over the objection and protest of his counsel, was required by the court to stand up and turn his back to the prosecuting witness in order to assist her in identifying him, if possible, and, by his standing up, she was enabled to state that the man that assaulted her was a short man like the accused.

Was this action of the court a violation of the rights of the accused under Section 10 of our Bill of Rights or the Fifth Amendment to the Constitution of the United States? The provisions are practically the same. The Bill of Rights provides:

"Nor shall any person be compelled, in any criminal case, to be a witness against himself."

Nearly every state in the Union has similar provisions in their organic law. In some of the states the provision is: "Such person shall not be compelled to give evidence against himself," the phraseology being slightly different but of the same legal effect. Note to *State v. Ah Chuey*, 33 Am. Rep., 530, 540.

The solution of the question is not free from difficulty from the adjudicated cases. The accused was required to stand up and turn his back to the prosecuting witness, in order that she might compare him with the person who fled after striking her. It would seem as if that was requiring him to give evidence against himself; but at the same time he was exercising his right to face his accusers, and, being in court, would be under the control of the court for all fair and reasonable purposes. So far as we have been able to ascertain, there are no reported

cases in this state bearing upon this question, either of our Supreme Court or of our lower courts; and in other states the authorities are conflicting.

*People v. Mead*, 15 N. W. Rep., 95 (50 Mich., 228); *State v. Jacobs*, 5 Jones Law R. (N. C.), 259; *Blackwell v. State*, 67 Ga., 76 (44 Am. Rep., 717); *Stokes v. State*, 5 Baxt., 619 (30 Am. Rep., 72); *State v. Ah Chuey*, 33 Am. Rep., 530, 540; *People v. Gardner*, 144 N. Y., 119 (38 N. E. Rep., 1003); *Johnson v. Commonwealth*, 115 Pa St., 369 (9 Atl. Rep., 78); *State v. Reasby*, 69 N. W. Rep., 451 (100 Ia., 231); *Day v. State*, 63 Georgia, 669.

In *State v. Jacobs*, *supra*, the court says:

"A judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro."

In *Stokes v. State*, *supra*, it is held:

"On an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted—*Held*: He was entitled to a new trial."

In *Blackwell v. State*, *supra*, the court held that:

"On a trial for murder the extent of an amputation of one of the prisoner's legs being a material question, it is error to compel the prisoner to exhibit his leg to the jury."

In *Day v. State*, *supra*, the court held:

"Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible."

A defendant can not be compelled to criminate himself by acts or words. The court say:

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"By the Constitution of this state no person shall be compelled to give testimony in any manner to criminate himself; nor can one, by force, compel another against his consent to put his foot in a shoe track for the purpose of using it as evidence against him on the criminal side of the court."

In *People v. Mead, supra*, the court held:

"A prisoner on trial for crime can not be required, against objection, to try on a shoe to determine whether tracks found at the scene of the offense were his own; nor if he objects can he properly be require to measure the shoe after trying it on."

In *State v. Ah Chuey, supra*, it was held:

"In a criminal case on a question of personal identity a witness testified that the defendant had certain tattoo marks on his person. The court compelled the defendant, against his objection, to exhibit his person to the jury—*Held*: No error."

The decision in the case was by a divided court, and we think the dissenting opinion of Leonard, J., is the better reasoning upon the facts of that case.

In *State v. Reasby, supra*, it was held:

"During the trial of a criminal case the defendant's brother, who greatly resembled him, took a seat by his side as a test of identity. At the request of the attorney for the state, the judge ordered the defendant to rise for identification against the objection of his attorney. The prosecuting witness then identified the one who stood up as the one who committed the offense charged. *Held*: That the action of the court in compelling the defendant to rise was not error, as compelling him to criminate himself."

In *People v. Gardner, supra*, it was held:

"Upon a trial of an indictment for an attempt to commit the crime of extortion, a witness called for the purpose of identifying the defendant as the individual in company with the prosecutrix upon an occasion having a material bearing on the case, testified that he did not know him, but would know him if he saw him. Thereupon defendant, by direction of the court, and against the objection of his counsel, was compelled to stand up and was then identified by the witness. *Held*: That the direction was not error; that this was not a violation of the

constitutional provision protecting a person from being compelled in a criminal case to be a witness against himself under the Fifth Amendment of the United States Constitution and Section 6, Article I of the Constitution of New York."

In *Johnson v. Commonwealth, supra*, it was held:

"Whether it would have been error, had timely objection been made and exception taken to the request of the district attorney to the prisoner to stand up and repeat certain words, is not decided, as the question was not properly presented to the court."

Per Sterrett, J.:

"To hold that this was a violation of the clause in Section 9 of the declaration of rights, which declares the accused 'can not be compelled to give evidence against himself' would in my judgment be a strained construction of that instrument."

From the foregoing authorities it will be observed, as we have said, that there is great disagreement in the courts of final resort in the different states upon the question involved. To attempt to review the reasons given in the different cases for the decisions made would take a great deal of space and throw little additional light upon the question.

We are impressed with the reasoning of the learned judge delivering the opinion in the case of *People v. Gardner, supra*, and, while there may be some doubt upon the question, we have concluded to follow that case. In the opinion, Earl, J., says:

"It is now claimed on his behalf that this action on the part of the court violated his constitutional rights, by compelling him to be a witness against himself (N. Y. Const., Article I, Section 6; U. S. Const., Amendment 5). We do not think that the defendant's constitutional right was violated, or that he was compelled, within the constitutional provisions referred to, to give evidence against himself. He was bound to be in court and in the presence of the jury, the recorder and the witnesses who might be there. The recorder, the jurors and the witnesses had the right to see him and he had the right to see them. It was necessary that he should be identified as the person named in the indictment and charged with the crime. \* \* \* There was nothing on his person or in his appearance that in any way connected him with the crime, or fur-

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nished any evidence whatever of his guilt. Suppose he had come into the court with his face veiled, could not the recorder compel him to remove the veil that his face might be seen? Could he not compel him to remove his hat; to stand or sit in the prisoner's dock? In the examination of the witness could not the district attorney have pointed to the defendant and asked the witness whether he was the person he had seen with Mrs. Amos? Instead of compelling the defendant to stand up, could not the recorder have directed the witness to go to the place where he was and look at him with the view of identifying him? If all these things could be done without violating the rights of the prisoner, how is it possible to say that he was harmed, or that his constitutional right was invaded by compelling him to stand up for the purpose of identification? For the orderly conduct of a criminal court it is requisite that the trial judge should have the power to say what place the prisoner shall occupy in the court room, whether at any time he shall stand or sit, and be covered or uncovered; and he must have the power at all times to keep the prisoner within sight of the court, the jury, the counsel and the witnesses."

In this case the accused was required to do nothing further than he ordinarily would do in coming into and returning from the court room during the trial. and the prosecuting witness would have had the same opportunity to observe him as she did when he was required to stand up and turn around while she was testifying upon the stand.

This exception will, therefore, be overruled.

We have examined the entire record carefully and find no error.

The judgment will be affirmed and the cause remanded.

*Erskine & Erskine* and *Dio Rogers*, for plaintiff in error.

*A. C. Lewis*, for defendant in error.

**CONTRACTS OF GUARANTY.**

[Circuit Court of Lucas County.]

NATIONAL BANK OF COMMERCE V. FRANK W. GARN ET AL.

Decided, February 7, 1902.

*Guaranty—Rule for Construction of Contracts of—Presumption against a Continuing Guaranty—Subsequent Transactions not Amounting to a Modification of—Payments of Later Loans—How to be Credited—Estoppel.*

1. A contract of guaranty is to be given that construction and effect which best accords with the apparent intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates and the circumstances accompanying the whole transaction, and should be construed as are all other contracts with the purpose of giving effect to the intention of the parties, and without straining the instrument beyond its obvious meaning for the purpose of enlarging the liability of the guarantors.
2. Where there is still doubt as to whether the guaranty was intended to be a continuing guaranty, the presumption is that it was not so intended, and this presumption may be given effect.
3. Subsequent transactions under or in pursuance of the contract, or with the contract in view, may be looked to for the purpose of discerning the interpretation the parties have themselves put upon its doubtful provisions.
4. The guaranty in suit, which was by individual stockholders for the benefit of the corporation, should be restricted to the first \$3,000 loaned, and not held to be a continuing guaranty.
5. While estoppel may arise as to guarantors who solicited further loans for the corporation and are claiming to be entirely relieved from liability therefor, the terms of the original guaranty are not thereby extended.
6. A bank is at liberty to make further loans to the party for whose benefit the guaranty was given and to discharge them without reference to the loans for which the guarantors became bound, and as a matter of law payments made upon subsequent loans need not be credited back upon the loans guaranteed.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

In the court of common pleas suit was brought by this plaintiff in error against this defendant in error, upon a certain writ-



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ten guaranty. A general demurrer to the second amended petition was sustained by the court; and the plaintiff, not desiring to plead further, judgment went against him, dismissing his petition, and adjudging the costs against him, and on account of that judgment he prosecutes error here.

So that it will be seen, the question is presented here, as it was below, upon the demurrer to the second amended petition. The question is whether the court erred in sustaining that demurrer. I do not know that it would be safe to undertake to paraphrase or abbreviate this petition. It is not very long, and I shall read it. (After the title.)

“The plaintiff, The National Bank of Commerce of Toledo, Ohio, a corporation organized under the banking laws of the United States, and doing business at Toledo, Ohio, for its cause of action against the said defendants, Frank W. Garn, Oliver B. Snider, Martin C. Trout and Andrew D. Stewart, says that on the tenth day of June, 1895, said defendants executed and delivered to the Ketcham National Bank of Toledo, Ohio, a written undertaking, a copy of which is as follows:

“TOLEDO, OHIO, June 10, 1895.

“Ketcham National Bank:

“We, the undersigned, hereby jointly and severally guarantee to you the payment of any and all sums of money that may be loaned by you to the Carothers Publishing Company, on request of F. W. Garn, treasurer, providing the amount of said loan shall not exceed in the aggregate \$3,000.

“F. W. GARN,

“O. B. SNIDER,

“M. C. TROUT,

“A. D. STEWART.

“Plaintiff says that subsequent to the execution and delivery of said guaranty, the Ketcham National Bank of Toledo, Ohio, changed its name to The National Bank of Commerce of Toledo, Ohio, under the provisions of the statutes of the United States; that the said Carothers Publishing Company, subsequent to the execution and delivery of said guaranty, changed its name to the Royal Publishing Company, under the provisions of the statutes of the state of Ohio; that said plaintiff is still the owner and holder of said contract; that subsequent to the execution and delivery of said contract the Ketcham National Bank loaned to the Carothers Publishing Company, on

request of F. W. Garn, treasurer, the following sums of money on the following dates, to-wit:

“September 13, 1895, \$2,800; October 11, 1895, \$3,800; April 22, 1897, \$500; July 31, 1897, \$600; August 8, 1897, \$500.

“Plaintiff says that at the time said guaranty was given and said sums of money loaned as aforesaid, all said defendants were stockholders in said company; that the defendants, Frank W. Garn, Martin C. Trout and Oliver B. Snider, were members of the board of directors of said company and constituted a majority of said board, and were actively interested in the business in which said company was engaged. That the said defendant, Frank W. Garn, at the time said guaranty was given and said money loaned, was treasurer and general manager of said company, and in full charge of its business, subject to the general supervision and control of said board of directors. That each and all of said defendants authorized the said F. W. Garn, as manager and treasurer of said company, to borrow of the plaintiff the aforesaid amounts and executed the said notes therefor; that at said time he and all of said defendants knew that said authorized loans were in excess of said \$3,000; that all of said loans were so obtained by said company upon statements made by said treasurer showing that said company was financially solvent; that said statements were made by the authority and with the knowledge of said defendants and for the express purpose of procuring said loans in excess of said \$3,000, and said loans were so made by said plaintiff relying upon the truthfulness thereof. The plaintiff says that said statements were false, and said company was at said times actually insolvent.

“That said defendant, Andrew Stewart, was a regular attendant on all stockholders’ meetings and knew the condition of said company, and knew that said company borrowed money from the plaintiff in the amounts above set forth, and in excess of said sum of \$3,000 and authorized the same.

“Plaintiff says that said sums of money loaned as above stated were secured by the several promissory notes of said company; that said notes were given for short periods of time and successfully renewed; that payments were made by said company on said notes thus renewed up to the — day of September, 1898, on which date the following notes given by said company to secure said indebtedness were outstanding and unpaid, to-wit:

“Note of \$475 dated July 2, 1898, due in ninety days.

“Note of \$3,200 dated July 9, 1898, due in ninety days.

“Note of \$2,200 dated July 19, 1898, due in ninety days.

“Note of \$550 dated August 24, 1898, due in ninety days.

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“Plaintiff further says that on or about the — day of September, 1898, R. E. Rickenbaugh was appointed receiver by this court for the purpose of closing up the business in which said company was engaged; and that thereafter R. W. Kirkley was appointed receiver by this court for the purpose of collecting from stockholders of said company the amounts due from them by reason of their liability as stockholders of said company under the statutes of Ohio.

“Plaintiff says that its claim against said company, by reason of said indebtedness, was approved in said proceedings heretofore had in this court, and said claim was allowed, with interest to January 31, 1899, in the sum of \$6,538.82. Plaintiff says that it has received from R. E. Rickenbaugh, receiver, the sum of \$879.79, and from R. W. Kirkley, receiver, the further sum of \$3,961.32, and which said sums were applied by plaintiff in payment of said loans so made as aforesaid in excess of said \$3,000, the amount named in said guaranty executed by said defendants, and the balance of said payments were applied upon the indebtedness secured by said guaranty; and that there is still due and unpaid on said guaranteed indebtedness the sum of \$1,697.71, with interest from January 3, 1899, for which amount plaintiff prays judgment against said defendants.”

Now, the questions debated and to be decided turn upon the construction to be given to this written guaranty, and perhaps somewhat upon the transactions of the parties averred to have taken place in pursuance of the guaranty or subsequent to the guaranty.

It was contended on behalf of plaintiff in error that this is a continuing guaranty, which authorized the bank to loan to the company whatever it might please to loan without limit as to time or amount, but that the limit of the liability of the guarantors (being the only limit) was fixed at \$3,000; and that therefore the guarantors would be liable to the extent of \$3,000 for any balance remaining unpaid upon any loan or loans that might be made at any time or in any amounts subsequent to the execution and delivery of this guaranty.

On the other hand, it is contended that this is not a continuing guaranty, but is restricted; that it contains a condition that the amount of said loan or the aggregate of all loans, should not exceed \$3,000, and that the violation of this authority would of itself operate to release the guarantors from all

liability; and that if this is not true, it is at least true that the guarantors have not authorized a succession of loans exceeding in the aggregate \$3,000, and have not agreed that they would be bound for any unpaid balance upon said loans, but that the restriction is that they will be bound for the first loan or loans aggregating three thousand dollars, and that any payments made upon that loan or which should be applied upon that loan in extinguishment of it, would extinguish their liability; and that there would be no liability attaching to them on account of subsequent loans.

By the diligence of counsel, we have been cited to a very great many authorities, which state principles and give illustrations bearing upon the questions in issue. It would be an almost endless task to review these authorities, and perhaps impossible to reconcile them, but we think that running through the approved authorities, there are certain principles about which there is no very great difference in the minds of the courts—certain well defined principles which may be applied here to a solution of these questions.

In the first place as to the general rule of construction. A contract of guaranty is to be given that construction and effect which shall best accord with the apparent intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates and the circumstances accompanying the whole transaction. And in that respect it does not differ from any other contract. It is to be construed as any other contract should be construed, the purpose being to ascertain the intention of the parties, and to give that effect.

The guarantors should be held to every obligation reasonably and fairly embraced within the terms of their contract, construed in the light of the language used and the concomitant circumstances, but the instrument should not be strained beyond its obvious meaning for the purpose of enlarging the liability of the guarantors.

After the application of these general rules, where there is still doubt whether the guaranty was intended to be a continuing guaranty, the presumption that it was not so intended may

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be given effect, and may turn the scale. That there is such presumption and that it has been recognized and approved as a rule by the Supreme Court of this state, appears from *Birdsall v. Heacock*, 32 Ohio St., 177. The question was whether a certain guaranty given by a father on account of his son authorizing the sale of lumber to the son should be regarded and enforced as a continuing guaranty or as a restricted guaranty. The syllabus reads:

"A letter addressed to a lumber merchant in the following language: 'Please send my son the lumber he asks for, and it will be all right,' is a guaranty that the lumber sold and delivered to the son, at the time of its presentation, will be paid for.

"But such guaranty is not continuing, so as to make the guarantor liable for lumber subsequently purchased by the son from the same merchant. And payments afterward made by the principal, on account, will be applied in satisfaction of the first purchase, and consequent discharge of the guarantor's liability."

In the course of the opinion, Judge Scott, after discussing the question whether this should be regarded as a continuing or restricted guaranty, uses this language:

"Upon this subject, it has been well said, that 'the chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances or be limited to the first. The better opinion would seem to be, that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad, to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention of the parties is so clearly manifested as not to admit of a reasonable doubt.'"

The language is quoted from 2 Am. Lead. Cas., 141, and a large number of cases are there cited in support of it.

It will be observed that this petition does not set forth the circumstances surrounding the transaction, the concomitants of the transaction, further than to state that these persons were members of this incorporated company, some being directors,

and one the treasurer and general manager, and then it proceeds to state what was subsequently done in the way of making loans to the company through this treasurer and general manager, upon the authority of the board of directors. Now, subsequent transactions, not amounting to a modification of the contract and not part of the concomitant circumstances, can not be considered as a part of the circumstances under consideration in formulating the terms of the contract, and hence be looked to for the purpose of ascertaining the sense in which or the intent with which such terms were used.

Counsel for plaintiff in error cites us to *Cambria Iron Co. v. Keynes*, 56 Ohio St., 501, in which consideration was given by the courts, in construing a contract of guaranty, not to subsequent transactions between the principal and the person to whom the guaranty was extended, but the course of dealing which had previously gone on between the guarantor and the creditor; and the first clause of the syllabus reads:

“In construing a contract of guaranty, the object should be to ascertain the intention of the parties; and, as in construing all contracts, the words employed by the parties should be construed in the light afforded by the circumstances surrounding them at the time it was made.”

The question there was as to the period of credit extended by the creditor. The previous course of dealing between the parties had been such that the period of credit did not exceed four months. Upon the note being executed and delivered into the hands of the creditor, further credit was given, and the time for the payment was extended, so that there became, not an extension of the time of giving credit by selling at a time subsequent to the time limited for giving credit, but an extension of time for payment upon the goods sold within the time limited, and it was with reference to that previous course of dealing as throwing light upon the sense in which certain terms were employed that averments were made and testimony heard—I do not know but that it went off on demurrer—but at all events, consideration was given to the course of dealing between the parties prior to and concurrently with the execution of the written guaranty.

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That there was any course of dealing between the principal and the creditors in the case at bar which would authorize us to look into the transactions to ascertain the sense in which the terms of the contract were used by the parties, is not disclosed by this petition. So far as appears by the petition this was the very first transaction that had ever taken place between the parties.

However, subsequent transactions under or in pursuance of the contract, or with the contract in view, may be looked to for the purpose of discerning the interpretation the parties have put upon doubtful provisions; and in looking into the petition for this purpose we believe that we are authorized to say that by soliciting this further credit to the company, the guarantors, directors and others interested in the company, have put it out of their power, have perhaps estopped themselves from claiming that they have been totally relieved from all obligation in consequence of credit having been given beyond the \$3,000 stated; but we do not think we are authorized to say that by so doing they have extended the terms of their guaranty so that they would be bound thereon as upon a continuing guaranty for any balance that may remain due upon credits given beyond \$3,000. In other words, we can not say that the plain limitation restricting the amount of the first \$3,000 loaned, was not waived or enlarged by the subsequent authority given to the treasurer to borrow money; though we hold that the making of further loans did not at once and of itself amount to such a violation of the contract as absolutely released them as guarantors. But there was no agreement at all that they would be bound beyond \$3,000; and therefore, that matter stands as if they had said in effect, "you may make these further loans, but you do it, not upon the faith of our guaranty, but upon the faith and responsibility of the company."

We are of the opinion that under all of the circumstances set forth in the petition, the guarantors were not bound beyond the \$3,000 first loaned. Now it appears from the petition that \$3,000 and more was loaned, so that the guarantors became responsible to the extent of \$3,000. It appears too that there is a balance due of \$1,697.71; and plaintiff says that he has

applied the remainder upon the part secured, leaving this balance, as he claims, of unsecured indebtedness.

The question, therefore, left for our determination is, whether or not this petition discloses that the \$3,000 first loaned has been paid. If the petition discloses that it has been paid, then it does not state any cause of action against the guarantors. It shows that there was a liability of \$3,000, arising upon loans exceeding \$3,000, *i. e.*, upon the first \$3,000; and unless it discloses that this has been paid, there is a cause of action stated in the petition.

It was held in *Birdsall v. Heacock, supra*, that under circumstances like those there appearing, payments made by the principal on account will be applied in satisfaction of the first purchase, and the consequence will be a discharge of the guarantor's liability; and it is urged by counsel for defendants in error that the payments which have been made here from time to time in the various ways shown by the petition, should be so applied, in discharge of the guarantor's liability that, *as a matter of law*, they should and must be so applied; and that, notwithstanding the averments of the petition that they have been otherwise applied, the law will make the application in such a way as to work the discharge of the guarantors.

Whether the applications stated of these payments were made with or without authority from the principal debtor or guarantors is not stated in the petition. It is silent upon that subject. That the application has been made is all that is stated. I read on the subject of the application of payments, from an old edition of Brandt on Suretyship and Guaranty, Section 286:

“When the liability of a surety or guarantor is for the debt of another, such liability, of course, ceases upon the payment of the debt. With reference to the application of payments, the general and well known rule is, that a debtor who owes several debts to the same creditor has the right at the time of making a payment to apply it to any one of the debts as he pleases. If he makes no appropriation of a general payment, the creditor may apply it as he sees fit. And where it is not appropriated by either the debtor or the creditor, the law will apply it according to the justice and equity of the case. The mere fact that there is a surety for one of the debts will not



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make any difference in this rule, when a payment is made in the principal, where the principal debtor pays part of the principal sum due, and the whole of a highly usurious rate of interest stipulated for, the surety is bound by this application of payment. Where a mortgage or other security is given by a principal to secure several debts due one creditor, for one of which debts a surety is liable, and there is no agreement or anything to indicate the intent of the parties as to how the proceeds of the security shall be applied, the creditor may apply such proceeds to the payment of the debts, for which the surety is liable. When three notes are secured by a trust deed, and the two first due are also signed by a surety, the creditor may, after the maturity of all the notes, apply the proceeds of the trust premises to the payment of the note last due, on which there is no surety. The fact that he required sureties on the two first notes, was evidence that he was not satisfied with the security of the trust deed. Principal and surety were liable for a debt, and afterwards the principal obtained further advances from the creditor, at the same time depositing with him certain copper to secure his indebtedness, but without specifying what indebtedness. The principal failed, and the creditor, against the objection of the surety, applied the proceeds of the copper to the payment of the subsequent advances. *Held*: He might lawfully do so. As the principal made no application of the payment, the creditor had the right to apply it as he pleased, upon the ordinary principle which entitles a creditor in the absence of any direction from the debtor paying, to apply the money he receives to whichever of several debts arising he pleases."

Notwithstanding this limitation in this written guaranty, it was competent for the company to borrow money from the bank. It was competent for the bank to give credit to the company and competent for the company to discharge such indebtedness by paying it; and to pay it without reference to the fact that it was indebted to the bank upon certain other loans, on account of which these guarantors had become bound; and we hold that payments made by the debtor company to the bank on other loans would not necessarily, as a matter of law, be credited—would not be required to be credited—upon the loan on account of which these guarantors were bound.

The case differs somewhat from the case of a general open account, like that in *Birdsall v. Heacock*, *supra*; for the general

rule is that where there is a general open account, and payments are made thereon generally (as in that case), the application shall be made upon the oldest item of the account. We know of no reason why this debtor company may not have gone to the bank and made any of these loans of hundreds and thousands of dollars and agreed to pay them, either at a date subsequent to that at which the first loan became due and payable, or at an earlier date, and actually have paid them when they matured or at some other time, without regard to the fact that there was another indebtedness existing upon which the guarantors were bound, and without offering such guaranty.

The petition discloses no direction from anybody as to the application to be made of payments, but states that payments were made and that the creditor bank applied the payments as stated, upon the unsecured indebtedness. It does not appear from the petition that the bank violated any rights of the guarantors in so doing. It is possible that it did. It is possible that some reason existed why those payments should have been applied and why a court of law or equity even now would require that they should be applied upon the first indebtedness; but that reason is not disclosed in the petition, and if it exists, it must be brought forward by an answer.

The petition sets forth that the debtor company failed; that the bank proved up its claim for \$6,538.82 upon these several notes of \$475, \$3,200, \$2,200, and \$550 which were given in extension—or some of them were—of the balance due upon the first \$3,000 borrowed, and upon the other amounts first borrowed, making up the \$8,200. Of the property which went into the hands of the receiver of the company, the bank received as its distributive share, \$879.79; of that which went into the hands of the receiver who was appointed in the proceedings to enforce statutory liability of the stockholders of the insolvent company, it received as its share upon these claims, the sum of \$6,839.82.

The question arises whether the petition discloses a state of facts which would require the application of the money thus received in any particular way, or requires that it should go into any particular channel. We think it does.

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In *Bank v. Cheney* (unreported), the court held that where there were various claims presented on behalf of the bank, upon some of which Mr. Cheney was surety, and upon others of which he was not, and there was a dividend paid to the bank upon their several claims, it was not competent for the bank to apply that dividend in such a way as to extinguish the unsecured claims presented and allowed, and leave the claims upon which Mr. Cheney was surety without any payment having been made thereon. Our view of the matter, without any authorities being presented at that time, was that the different claims should *pro rate*; that the court had allowed these different claims, and that the dividends were upon the different claims, and that when the dividends were paid, the application should be made *pro rata* upon the different claims, and we enforced that rule. In looking into the case, we find authority in support of that ruling, although we found none at that time.

In 7 Bingham, 489, I read the syllabus:

“The defendant guaranteed plaintiffs against debts to be contracted by L. M. to the extent of 400 pounds. L. M. became indebted to plaintiffs to the amount of 625 pounds, upon which by a composition with his creditors, he paid them 8 shillings 7 cents on the pound, leaving due to the plaintiffs out of their whole claim 336 pounds. The defendants being sued for that sum upon their guaranty—*Held*: That they were entitled to deduct from it 171 pounds, 13 shillings and 4 pence, the amount of the dividend of 8 shillings 7 cents on the pound upon 400 pounds.”

The matter is very well argued out by Kirdle, Chief-Justice, and the reasoning is very satisfactory to us. I do not take time to read it.

I call attention to another decision in line with that, in 5 Moore & P., 327. I will not stop to read it, but will simply say that the same doctrine is announced and applied.

So that we hold that the amounts received from these receivers upon this balance of indebtedness of nearly \$5,000 should be applied *pro rata* upon the different claims presented and allowed; not only that received from the receiver of the insolvent company, but that received from the other receiver, who had collected from the stockholders on account of their statutory

liability. We do not understand that the latter fund should be treated differently from any other to which the creditors might resort. We do not understand that the bank had any peculiar or special interest in that fund that these guarantors can not as well assert for their benefit—that these guarantors would not be subrogated to in the event they discharged the indebtedness, and sought relief against the debtor; and therefore we hold that both of these funds should be treated, as a matter of law, as having been applied in that way.

Nevertheless, it is not apparent that that would extinguish this indebtedness. It might still leave a balance of the first \$3,000 unpaid. That balance may turn out to be as great as the balance claimed in the petition, or it may be less, or there may be nothing remaining unpaid of the first \$3,000 loaned. This may depend upon the amount, if anything, of the first \$3,000 loaned carried into these renewal notes. The transaction in the way of loans and payments and applications of payments up to the making of these last notes, are not set forth specifically in detail, but the petition avers that there is a balance of the secured indebtedness carried into these renewal notes and yet unpaid, and therefore we are of the opinion that the petition states a good cause of action, and that the court of common pleas erred in sustaining this demurrer.

The judgment will be reversed and the cause remanded.

*E. W. Tolerton*, for plaintiff in error.

*G. P. Voorhees*, for defendant in error.

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**LIS PENDENS.**

[Circuit Court of Cuyahoga County.]

LESLIE M. GREEN v. PERRY S. GREEN.

Decided, February 10, 1902.

*Lis Pendens—A Case Ceases to be, When—Following a Dismissal, Doctrine of, Applicable During the Remainder of the Term.*

1. A case is *lis pendens* during the entire term during which the court renders a judgment dismissing the petition.
2. A suit for divorce and alimony and to enjoin the transfer of property was dismissed. A motion for a rehearing was filed before the end of the term, and at a subsequent term this motion was heard and the prayer of the petition granted. *Held:* That the suit was *lis pendens* from the dismissal until the filing of the motion for a rehearing, and the case did not cease to be in court until the plaintiff obtained the relief sought.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Heard on appeal.

It is unnecessary to state the facts in this case in full. The plaintiff, Leslie M. Green, brought an action in the court of common pleas for divorce and alimony against her husband, Perry S. Green, and undertook to tie up certain property by injunction which she claimed had been unlawfully transferred from her husband and that he was the true owner of the same. She failed to obtain either divorce or alimony, and she was dismissed out of court. A motion for a new trial was overruled, and, at the same term, she filed a motion for a rehearing. The motion was granted, and she obtained her divorce and alimony upon the rehearing.

Either after the first judgment in the case and the time of filing the motion for a rehearing, or just before the first judgment, this property in question was transferred by the one who held the title to the same; and, notwithstanding such transfer, she now seeks to fasten upon it her right to subject the same to the payment of her alimony; and the only question in the case is this: There was a judgment against her and she was dismissed entirely out of court, and so remained until at the

same term she filed her motion for a rehearing, which motion was heard after the term, and granted, and she obtained her relief sought. Was the case *lis pendens* between the time of the dismissal of her petition by the court and the time when the motion for a rehearing was filed? In other words, was the case in court during the period?

It is not denied in this case by the defendant but that the court of common pleas had jurisdiction over its records and judgments during the term at which they are made. In fact, it is too well settled in this state to any longer be a question of controversy. *Huntington v. Finch*, 3 Ohio St., 445; *Knox Co. Bank v. Doty*, 9 Ohio St., 505; *Kelly v. Stanbery*, 13 Ohio, 408; *Niles v. Parks*, 49 Ohio St., 370; *Huber Mfg. Co. v. Sweny*, 57 Ohio St., 169; *Ash v. Marlow*, 20 Ohio, 119, 131.

Nor is it contended in this case by the defendant that it made any difference whether the court acted upon the motion for rehearing at the same term in which the plaintiff was dismissed out of court, or at a subsequent term, provided the motion was filed, as it was in this case, at the same term.

The only question is: Was the case pending in such a manner in the *interim* above named, that it can now be said to be *lis pendens* during that time?

We have been cited to a number of cases, none of them, however, being directly in point on the question in the case before us for determination. In some of them it has been held that a bill of review filed and on a hearing of the same a new trial granted, that between the time of the first judgment and the filing of a bill of review, the case was not *lis pendens*. But, upon an examination of these cases, we find that in none of them was the bill of review filed at the same term of court; and the courts seem to differ upon the question, under the facts just stated.

There is a difference of opinion when the one acquiring an interest in the subject of the litigation after the original decree is entered and before the bill of review is filed, takes title subject to such final action as may be had under any bill of review which may be subsequently filed.

Among the decisions confirming that purchasers, before the bill is filed, are, nevertheless, bound by the result thereof, are many of those that have been cited. And courts differ as to this question, where an appeal is taken or error is prosecuted, and the title changes after the judgment and before an appeal is prosecuted or error is taken.

The case of *Ludlow v. Kidd*, 3 Ohio, 541, 544, has been criticised upon the supposition that the court meant to say that after the judgment, one who purchases is not bound by *lis pendens*, notwithstanding that the case is thereafter brought into court under a bill of review.

None of these cases are, in their facts, like the question before us, nor is the principle the same in that the question in our case is determined entirely by determining whether a case remains in court during the term at which judgment is given or refused and until the end of such term.

In contemplation of law a term of court is but one day, and all judgments are supposed to be of that one day; and yet this fiction must give way where two acts of the court are drawn in question as to which is prior, and then the question is determined by the facts to be established by evidence.

The court retains control over its entries during the term is undisputed, and this is equivalent, in our judgment, to saying that the case remains pending in the court during the term at which the judgment is rendered. A court certainly can not adjudicate in a case not in its court; and when the law says that a court *may* modify its judgment during the term, it must mean that it may modify it in a case that is pending.

But this does not answer the entire question: Is it pending in such a manner as to become *lis pendens*? In other words, is it notice during the entire term, or only until the time that judgment is rendered. It is claimed that any one seeing the record of the court, will see that all matters in the case have been adjudicated and are at an end. But this latter conclusion would be wrong, for they are not at an end and do not terminate before the close of the term.

It has been held that when a judgment is set aside at the same term, the case stands in court as though it had never been

tried. 27 Ark., 295; *Stannard v. Hubbell*, 25 N. E. Rep., 1084 (123 N. Y., 520).

And in *Ludlow v. Kidd*, *supra*, if the Supreme Court had found a case establishing this doctrine just announced, evidently from the opinion it must be concluded the court would *not* have concluded as it did in that case.

Cases fairly in point on this question are not numerous, and, in fact, we have found but one that fairly decides the exact question before us, and that is *Cornell University v. Parkinson*, 53 Pac. Rep., 138 (59 Kansas, 365). The district court, in disposing of the case, used this language on page 140:

“The first rule to be considered is this: That the court has absolute control of its decrees and judgments during the term at which they are rendered. They are, as expressed by some writers, within the breast of the judge during the term. This is a wholesome provision of the law and necessary to the administration of justice. In the hurry of business and confusion incident to a term of court, it often becomes necessary to correct during the term the mistakes that have been made; and these can be corrected at any time during the term, and the term is only one day, in law; and persons who purchase property upon decrees must understand that rule, and purchase with reference to it.” \* \* \*

And the court concluded that there was no estoppel of record in that case; that is by the mere entry of the judgment, as the judgment does not become final until the term adjourns; that is final in the *sense* that it is beyond the control of the court that pronounces the decree. In that case, the court found an element of estoppel which prohibited in equity the party seeking to obtain relief. So that, notwithstanding the purchase was made *lis pendens*, the other party was debarred from taking advantage of the same.

It has been held that if an appeal is prosecuted in a case before the end of the term at which the judgment was rendered, or proceedings in error are had before the end of the term, and although the jurisdiction of the appellate court may have attached, yet the trial court is not thereby barred from changing its judgment during the term. *Blum v. Wettermark*, 58 Tex., 125; *Grubbs v. Blum*, 62 Tex., 426.



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Our conclusion in this case is, that the case was *lis pendens* during the entire term in which the court rendered the judgment dismissing the petition, and the motion having been filed at that term, the transfer of the property was made while the case was yet in court, and that it never *ceased* to be in court until the plaintiff obtained the relief that she sought in her petition, and that the plaintiff is entitled to the judgment that she seeks.

*J. F. Clark*, for plaintiff.

*White, Johnson, McCaslin & Cannon*, for defendant.

#### JUDICIAL NOTICE OF ORDINANCES.

[Circuit Court of Ashtabula County.]

ALBERT STRAUSS V. VILLAGE OF CONNEAUT.

Decided, January Term, 1902.

*Sunday—Prosecution for Keeping Place of Business open on—Courts will Take Judicial Notice of Ordinance—What it Must Contain—Need not be Included in Bill of Exceptions.*

1. In a prosecution for the violation of a municipal ordinance, a municipal court will take judicial notice of the existence of the ordinance.
2. A court of review occupies the same relation to the ordinance as the municipal court, and where one against whom a penalty has been assessed for the violation of an ordinance seeks to have the judgment reversed, the reviewing court will also take judicial notice of the ordinance under which the conviction was had.
3. An ordinance prohibiting common labor or the opening of places of business on Sunday is invalid if works of necessity or charity are not excepted therefrom, and a judgment of conviction under such an ordinance will be set aside.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Heard on error.

Strauss was convicted before the police justice for a violation of an ordinance of the village of Conneaut for keeping his place of business open on Sunday.

The ordinance provides "that it shall be unlawful for any person over fourteen years of age to engage in common labor or to open or cause to be opened any building or place for the transaction of business on the first day of the week, commonly called Sunday.

The ordinance further provides in a separate section that its provisions do not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and who do in fact on that day abstain from the doing of the things prohibited by the ordinance, but does not exempt works of necessity and charity.

Strauss, by his counsel, filed a motion for a new trial, which was overruled by the police justice, and six days were given to prepare, have allowed and file a bill of exceptions, which was done.

Application was made to the court of common pleas to file a petition in error, which was granted by the court. Thereupon the village, by its counsel, filed a motion to strike the bill of exceptions from the files for the reason that the police justice had no authority to allow six days to prepare and file a bill of exceptions. The motion was sustained and the petition in error was dismissed by the common pleas court.

The ground of error relied upon is that the ordinance under which Strauss was tried and convicted is invalid for the reason that it does not except works of necessity and charity. The question was not passed upon by the court below for the reason that the ordinance was included in the bill of exceptions, and the bill being stricken from the files, that question, as it was claimed, was not before the court. The principal argument before us has been as to whether or not the common pleas court erred in striking the bill of exceptions from the files for the reason that the police justice had no authority to give time for the filing of a bill of exceptions.

As to whether or not a municipal court, in a prosecution for a violation of an ordinance, has the power to extend the time after judgment for the filing of a bill of exceptions has been much controverted. In two circuits, the sixth and eighth, it has

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been decided it has no such power, while in the second it is held that it has. As we view the case it is not necessary for us to determine this question, for the reason that this court will take judicial notice of the provisions of the ordinance under which the accused was convicted, and its incorporation in the bill of exceptions was unnecessary.

Upon the trial in the municipal court the police justice must have considered the ordinance under which the charge was made independent of whether it was introduced in evidence or not. It was not necessary in the affidavit to aver the existence the contents of the ordinance, nor was it necessary to prove the same. Courts of general jurisdiction will not take judicial notice of municipal ordinances in original actions brought upon the ordinance, but in actions in the municipal court in a criminal prosecution for a violation of the ordinance the jurisdiction of the court depends upon the ordinance under which the prosecution is had. The ordinance is the foundation of the prosecution.

The question has not been determined by our Supreme Court, and so far as we know by any circuit court of this state. While there is a diversity of holding in the other states (17 Am. & Eng. Enc. Law, 2d Ed., 937), we think the better opinion is that municipal courts will take judicial notice of the ordinances of municipalities in actions to enforce the same, and that it is not necessary to introduce the ordinance in evidence. *Solomon v. Hughes*, 24 Kans., 211; *Downing v. Miltonvale*, 14 Pac. Rep., 281 (36 Kans., 740); *Moundsville v. Velton*, 13 S. E. Rep., 373 (35 W. Va., 217); *Laporte City v. Goodfellow*, 47 Ia., 572; *Incorporated Town of Scranton v. Danenbaum*, 80 N. W. Rep., 221 (Ia.).

If the municipal court takes judicial notice of the ordinance under which the conviction is had, the reviewing court must do the same, otherwise the accused would be without remedy. It not being necessary to introduce the ordinance in evidence, the record would be barren of the ordinance, and however invalid the ordinance might be, the accused could not have determination of the reviewing court upon its validity. The reviewing

court occupies the same position as the municipal court in relation to the ordinance; what was law before it is law in the reviewing court, and what was fact before it is fact before the reviewing court. The law need not be averred and proven while the facts should be. One is taken judicial notice of; the other must come before it by a bill of exceptions. *Hanley v. Donoghue*, 116 U. S., 1 (6 S. Ct. Rep., 242); *Moundsville v. Velton*, 13 S. E. Rep., 373 (35 W. Va., 217); *Downing v. Miltonvale*, 14 Pac. Rep., 231 (36 Kans., 740); *Keck v. Cincinnati*, 4 Dec., 324; 17 Am. & Eng. Enc. Law (2d Ed.), 938.

This holding in no way conflicts with the decision in *Toledo v. Libbie*, 19 C. C., 704, 705. That case was an original action brought in the common pleas court, and that court could not, under the well settled rules of law, take judicial notice of the ordinance, but held that it must be plead and proved, and, therefore, the circuit court upon review could not consider the ordinance, it not being attached to the bill of exceptions. In that case it was said, however, that "city courts and mayors of villages take judicial notice of the ordinances of their respective municipal corporations."

The ordinance in this case is attached to the record and is certified by the police justice as the ordinance under which the conviction was had, and counsel concede that to be so; it shows that no exception is made of works of necessity and charity. However necessary it might have been for the accused to open his store, or whatever charitable purpose it was to subserve, could not have been shown under the ordinance. It must, therefore, be held invalid. Such is the distinct holding in *Canton v. Nist*, 9 Ohio St., 439. The judgments of the common pleas court and of the police justice are reversed and the accused is discharged at costs of defendant in error. Case remanded to common pleas court for execution.

*Parker & Smith*, for plaintiff in error.

*A. M. Cox*, for defendant in error.

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**INJURY TO BRAKEMAN FROM USE OF A DEFECTIVE CAR.**

[Circuit Court of Lucas County.]

MICHIGAN CENTRAL RAILWAY CO. V. WILLIAM BUTLER.

Decided, January 13, 1902.

*Negligence—Brakeman Seizes Defective Grab Iron and Falls Beneath Car—Defect in Iron not Noticed by Car Inspector—Construction Given to Rule by Employes with Knowledge of Employer—Varying Degrees of Danger as between Customary Methods—Circumstantial and Corroborative Testimony.*

1. Where an employe went about his work in the customary manner, and did not assume a hazard that a person of ordinary prudence engaged in the same work would avoid, he can not be regarded as guilty of negligence, notwithstanding he did not adopt the safest course open to him.
2. It can not be assumed that a rule was violated, and contributory negligence predicated on such violation, where it appears from the evidence that by the general or uniform practice of employes, which practice seems to have been known to the employer, the rule was not regarded as applicable to a situation such as the one in which the accident occurred.
3. Chalk marks indicating that a car was out of repair, but which were not readily noticeable to a brakeman operating the car in the yards at night, do not amount to notice to such brakeman of the defective condition of the car; and were such not the case, the notice would not go beyond the defect which the inspector discovered when he marked the car to some other defect which he did not discover.
4. The failure of a car inspector to discover that a grab iron or hand hold was not properly fastened, indicates a failure to thoroughly inspect the car, and the operation of such a car constitutes under Section 2365-21 *prima facie negligence*.
5. Testimony to the effect that a person who has been subpoenaed as a witness was heard to make a certain statement is corroborated to a certain extent by the failure to put the person alleged to have made the statement on the stand.

PARKER, J.; HAYNES, J., and HULL, J., concur.

Heard on error.

William Butler, a yard switchman, in the employ of the Michigan Central Railroad Company, was injured on May 4,

1900, at about 10 P. M., while in the line of his duty attempting to mount a flat car for the purpose of setting a brake upon it. He fell upon the track and the wheels of a car passed over his right leg, crushing it, making necessary the amputation thereof just below the knee-joint. In the court below he recovered a judgment for \$7,500.

The negligent act complained of was having a car in service with a defective grab-iron on the end thereof, which Butler claims gave way as he put his hand and part of his weight upon it in an attempt to spring upon the car.

It appears that Butler had been at work for the company at its North Toledo yards that evening, coupling and uncoupling cars that were being shifted by the yard engine to the various tracks in the yards; that just before the accident the engine had pushed two flat cars eastward upon what is called the "short repair track" of the company. That the foremost car was empty and the second car was loaded with defective car wheels. There was no eye-witness to the accident other than Butler. He testifies that as these cars came upon the short repair track he was a short distance eastward of the point where said track diverges from the other tracks, and south of said track. That he started to intercept the cars and mount them and set brakes upon them. That because of car wheels upon the ground between him and the short repair track, he was obliged to pass a short distance to the westward, and as he came to said track, the forward or east end of the forward car, which was the empty car, had passed him, so he continued westward until he came opposite to the opening between the two cars, when he stepped between them, and, placing his right hand upon the grab-iron, which was upon the west end of the east car, and his left hand upon the platform of the approaching or westward car, he attempted to spring or throw his body so as to seat himself upon the forward car, and, in so doing, he threw his weight partly upon this grab-iron, as before stated, when it gave way, with the result stated.

The evidence shows that the grab-iron, which consisted of an iron rod about three-quarters of an inch in diameter and eighteen inches long, was placed upon the end of the car to

aid trainmen in coupling and uncoupling cars, but that it was not unusual to make the use of it, which Butler attempted on this occasion, and that this manner of mounting the cars was not considered especially hazardous. That this grab-iron was securely fastened at the inner or northern end, but the outer or southern end had not been fastened except by being placed behind a certain plate bolted on the southwest corner and west end of the car—slipped or dropped between this plate and the end beam of the car—where it could not be dislodged by pulling down or pulling outward toward the west, but might be easily dislocated by lifting about five inches and then pulling an inch or so to the westward.

An inspector of cars in the service of the company testifies that at about 2 o'clock A. M. of the same day he inspected this car and found the forward journal on the south side cut, and the western end sill somewhat broken, and he then put three "Xs" upon the car, with chalk, which was the usual manner of indicating to the trainmen that the car was defective, a "cripple," and was to be set upon the repair track for repair; and he says that at that time he observed that the grab-iron was in position, though he admits that the method described of fastening the southern end was defective, and that he overlooked this defect, which we think he would have discovered if he had observed due care.

Now counsel for the company contend that the plaintiff has failed to establish that the accident happened in the way he describes it, and says that it is fairly inferable from the evidence that he attempted to mount the eastern car at the southeast corner thereof, where there was a stirrup, a hand-hold and a brake staff, affording safer and more convenient means of mounting the car, and that he slipped and fell, through no defect in the car and no fault of the company.

This conclusion is urged, first, upon the ground that that would be the most natural and ordinary way to mount the car; and, second, because, it is said, the grab-iron, if in place, could not be dislodged by the movement attempted, since that would cause a pressing down upon and not a lifting up of the grab-iron; and, third, because a close inspection of the second or

westward car failed to disclose a particle of blood upon any of the wheels, while particles of blood, though infinitesimal, were found upon the second wheel westward from the east end of the forward car, indicating that that wheel passed over the leg.

Of these in their order: First, under the circumstances related by Butler of the east end of the forward car having passed him before he came near enough to mount it, and especially in view of the fact that it was his purpose, as he says, to set the brake upon the eastern end of the westward or loaded, car, whereby he could better control both cars, it is not apparent that it would have been more natural or convenient to mount at the southeastern corner of the eastern car; and it is shown by the testimony of many witnesses upon the subject, that the difference in the two methods, in point of ease, convenience or safety, was not great; that is, the employes in this line of service discerned no great difference, and the method attempted was not unusual.

Second. While the inspector at 2 A. M. observed the grab-iron in position, and Butler testifies that at the time he took hold of it it seemed to be in position, it is evident, if credit is to be given to the account of Butler of what happened, that the end had become dislodged from its position behind the plate, though the nearly horizontal position of the iron may have been preserved. This might easily happen in the twenty hours intervening between the inspection and the accident. The evidence shows that the fastening at the north end was so tight that the horizontal position of the iron might have been maintained though the south end were not behind the plate.

Third. Butler was not removed from the track until both cars had passed beyond him. Even if three of the wheels of the front car passed over his leg, four wheels of the hind car must have done so also, so that if blood should have spurted and lodged upon any car wheel, it is difficult to see why some sign of blood could not be found upon the wheels of the hind car. But the examiners thereof found no blood on the wheels of the hind car, which certainly ran over the leg whether the accident happened as related by Butler or as conjectured by the company. In view of these facts and of the extremely insigni-



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nificant quantity found, which might have come from a scratch or abrasion of a hand in taking off the wheel, or a slight bleeding of the nose of some employe, or might have come from some animal (for the experts can not say that it was human blood, or how long it had been upon the wheel), or from any one of a multitude of causes not improbable, we think that this and the other circumstances mentioned are not sufficient to overcome the positive statement of Butler; at least they are not sufficient to require the jury to disregard the testimony of Butler or to authorize us to say that the verdict is contrary to the weight of the evidence. Besides, Butler's account has some corroboration in the testimony of the car inspector who says that twenty-five minutes after the accident happened he found this grab-iron hanging down, the south end having become entirely liberated from its fastening behind the plate and the north end only being attached, and one Gayes Orr, an employe, also testifies to this grab-iron hanging down soon after the accident.

It is also urged on behalf of the company that Butler was guilty of negligence in adopting the method he attempted to pursue to mount the car. I have said enough on that point to indicate our views that the jury was not required to come to that conclusion. If he went about his work in a usual and customary way and did not take a hazard that a person of ordinary care and prudence would avoid, he was not guilty of negligence even though he did not take the very safest course open to him. The jury had a right to give some consideration to the circumstances, making it impracticable for Butler to carefully consider or deliberate upon the shades of difference in point of safety between the different usual and customary methods open to him.

It is also urged on behalf of the company that Butler acted in violation of rule No. 26, governing employes, which appears upon page 97 of the record and reads as follows:

"Jumping on or off cars or engines in motion to couple or uncouple them, and all similar imprudences are forbidden. Every employe is required to exercise the utmost caution to avoid injury to himself or fellow employes, especially in coupling, switching or other movements of cars and trains."

It is not claimed that this rule is strictly applicable to the case in hand, but it is said this imprudence upon the part of Butler was similar to the imprudence which is expressly prohibited, namely, the jumping on or off cars or engines in motion, to couple or uncouple them. But it seems by the evidence that by the practice of the employes, which seems to have been known to the employer, the general or uniform practice of employes, this rule was not regarded as applicable to a situation like that which we have under consideration; hence we can not say that this rule was violated.

Counsel for the railroad company also urges that under the circumstances this was an assumed hazard or risk. I can not better state his claim and proposition than by reading it from his brief.

"We submit that the verdict and judgment was contrary to law. That even if the plaintiff was injured in the manner in which he claims to have been—the car having been by the company inspected, the defect having been found, and the car marked for the repair track to be repaired, all in the usual and customary method and manner of giving notice or warning to those who were to perform service upon it—that Butler in attempting to perform service upon it, without objection and complaint as to the method and custom of giving such notice and warning, assumed the risk and peril of the service.

"We submit that the judgment should have been in favor of the plaintiff in error, upon the ground that there was no legal negligence proven against the company; in other words, that the company having inspected this car and found it to be defective and marked it for the repair track, which was the known, customary and usual notice and warning to those who were handling it before they performed any particular service upon it to look to see if it was fit to perform service on; that attempting to perform some particular service at some particular point on the car, without making some investigation and examination to see to its condition, whether safe or not, he took upon himself and assumed the risk and peril of the service."

Section 2365-21, Revised Statutes, makes the use of the defective car *prima facie* evidence of knowledge of the defect. This *prima facie* case is not overcome in this case by proof of lack of knowledge and lack of opportunity to obtain knowledge of the defect. The car inspector had discovered a defect in this

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car, and, in our judgment, by the exercise of ordinary care, he would have discovered this defect.

Did the marking of the car give Butler such notice of the defect as to put him in the position of assuming the risk incident to operating the car? As a rule the employe does not assume the risk of using defective machinery or appliances; but if he have knowledge of the defect and risk and continues to use the defective machinery and appliances without objection and without a promise by the employer to remedy the defect, he will be held to have assumed the risk. So, if his employment requires him to take charge of and operate defective machinery, etc., and he is aware, or by the exercise of reasonable diligence and prudence may be made aware that he is operating such defective machinery or appliances, he will be held to have assumed the risk. The case of *The Chicago & Northwestern Railway Co. v. Ward*, 61 Ill., 130, is a case of that character.

Does the case at bar fall within this class? Butler says that he was not in fact aware of this defect, or of any defect in the car. That he had not observed the three "X's" marked with chalk by the inspector on the end of the car, and that his attention had not been drawn thereto in any way. These marks were on the west end of the empty car, where, after night, though a bright night, and though he had his lantern in his hand, he might not have readily observed them. He could not see them until the car passed him and he had turned to go between the cars to mount the car. The fact that the car was being set in on the repair track did not necessarily indicate to Butler that it was a defective car, designed for repairs, for that track was used for the loading and unloading of car wheels and other parts of cars, as well as for repairs; and Butler testifies that he heard the yardmaster tell the conductor, shortly before the accident, to run these two cars upon this track, unload the loaded car and then load both cars with car wheels, and this testimony has some corroboration in the fact that the yardmaster, who was subpoenaed as a witness, was not put upon the witness stand to dispute it. It is also shown that the words: "Set on short repair track for wheels" were chalked upon this car, and that these words indicated that it was to be set in there

to be loaded with wheels; so that, under all the circumstances, we can not say that Butler was guilty of lack of ordinary care or diligence in failing to discover that this was a defective car or that he was chargeable with knowledge of that fact so that he should be held to have assumed the risk of going upon and operating the car. That it was his duty at that time and place to mount the car and set the brake is unquestionable and conceded.

But, assuming that he was bound to know what the "XXX" would convey to him, *i. e.*, that this was a defective car, of knowledge of *what defect* would he thereby become chargeable? The only defects discovered by the car inspector, whose duty it was to detect defects, were those in a journal of one wheel and a break in the west end sill, though this grab-iron was in immediate proximity to the defect in the end sill.

We are of the opinion that if Butler was chargeable at all with constructive notice of defects in the car, because the car had been marked with "XXX", it would be of such defects only as had been discovered by the car inspector, and on account of which he had thus marked the car for repairs. That such notice would not reach beyond the information that Butler would have gained if he had gone to the inspector for information as to the reason of his putting the "XXX" on the car. To hold otherwise, might, we think, afford the railroad company a simple and yet effective, though unfair, method of nullifying Section 3365-21, Revised Statutes, for they might mark *all* cars "defective," on account of actual, suspected or possible defects, and thereby throw the risk, under the doctrine of assumption of risks, upon the employe, and wholly escape the responsibility designed to be fixed by this statute.

And, under the circumstances, we can not see that Butler was guilty of negligence in failing to discover this defect which had been overlooked by the car inspector.

The case of *New Orleans & N. E. R. Co. v. Clements*, 40 U. S. App., 465, is a case in many of its aspects like the one under consideration, and I read the statement of the case as given upon pages 466 and 467.

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"This is an action to recover damages for personal injuries, brought by E. T. Clements against the New Orleans & North-eastern Railroad Company, a corporation created under the laws of the state of Louisiana, and tried before the circuit court and a jury, in which a verdict and judgment were rendered against the defendant for \$12,500. There was a motion by the railroad company for a new trial, which was overruled, and thereupon a writ of error was sued out. The defendant in error, Clements, was an employe of plaintiff in error in its Meridian yards, in the capacity of night yard foreman. It was his duty to place cars coming into Meridian on tracks or sidings where they belonged, according to the course of business of the company. The company had certain inspectors in the yard, whose duty it was to inspect all cars as they came in, and it was Clements' duty to handle such cars after they had been inspected. He had an engine and crew under him to assist in handling these cars. On the night of October 15, 1897, a train of flat or gondola cars, loaded with gravel, consigned to Meridian, reached Meridian on the Alabama Great Southern Railroad about 9 o'clock p. m. These cars were immediately inspected by the inspectors, and about 11 p. m. Clements proceeded to place the cars on their proper track. For this purpose he had the engine coupled to the cars, and on signal by him the engine pulled the cars forward. Clements, having first cut the cars intended to be moved from other cars to which they were coupled, started forward the way the cars were moving—walking along the south side of the cars. Noticing that a brake on one of the cars—a flat car belonging to the Alabama Great Southern Railroad Company—was "set up," and that the car was jerking along impeded by the brake, he, in pursuance of his duty, climbed on front of the adjoining car in order to let the brake off. Having reached the platform of the connecting car, the cars then being slowly moving, he turned and stepped from that car forward to the end of the next car, where the brake was, at the same time reaching forward and taking hold of the brake wheel. The wheel of the brake came off, and Clements fell backward and against the end of the car from which he had just stepped, and thence to the ground, on the right side of the train—the side opposite to that from which he had climbed—and his left hand fell across the rail and was run over, and so injured that it had to be and was amputated. It transpired that the nut which belongs on the top of the brake rod was absent, and there was evidence that it had been off a day or two. This nut is for the purpose of holding the brake wheel on, and the brake wheel came off because of the absence of this nut. The action was predicated upon the alleged negli-

gence of the company in not properly inspecting the car, the plaintiff alleging that he was exercising due care. The railroad company, in defense of the action, denied the alleged negligence, and also denied that the plaintiff was in the exercise of due care, and pleaded certain rules of the company which it claimed made it the duty of Clements to inspect the brake wheel, and averred that Clements had ample time and opportunity to so inspect said brake as to have discovered said defect and thus guard himself against injury, and that plaintiff was guilty of contributory negligence."

In the opinion by Judge Pardee, there appear quotations from a number of cases in point, but I shall confine my reading to his language in closing, at pages 473 and 474. He says:

"In the light of these decisions, we understand the law to be that, as to patent defects in machinery furnished by railroad companies for the employes to use, the railroad companies are insurers in all cases where the employe, by reason of his employment or the circumstances of the case, has no full opportunity, before using the machinery in question, to observe and note the patent defect; and the rule is the same with regard to all defects that can be discovered on proper examination and inspection.

"In the present case the defendant in error was not called upon by his duty to make any particular inspection of the cars turned over to him after the regular inspection. As to the particular defect which resulted in his injury, the proof is clear that although the defect was patent, and could and would have been readily noticed by any employe called ordinarily to use the same, the defendant was called upon to use it at night, in an emergency, and without opportunity to examine or inspect the same. It may be, as counsel for plaintiff in error argued, that he knew that the car had lately come in from another road; that after he reached the platform of the car he could, with the slightest movement of his hand, or instantaneous movement of his lantern, have discovered the condition of the brake (that is, the absence of the nut); and that upon that discovery he could have used the brake ("let it off") in such a way that he would not have been injured. But the trouble is, he had no opportunity to examine the condition of the brake with his hand, or by any movement of the lantern. In the line of his duty, he was climbing on top of the car as it was moving, and he reached for and caught the brake to support himself preparatory to using the same; and to say, under such circum-

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stances, that he should have made a preliminary inspection, is contrary to both reason and authority.”

As I have said, the plaintiff recovered a verdict and judgment for \$7,500. It is urged on behalf of the railroad company that this was excessive. I do not wish to discuss that, but will simply say that we have given it very careful consideration, both in connection with the tables which show what annuity this sum would purchase, he being forty years of age, and in connection with the testimony as to his condition and the probabilities of his being able to earn something in the future and also after considering the testimony as to his expenses, his pain and suffering, and the embarrassment, hindrance and mortification due to being crippled in this way, and after full consideration of all these and other matters bearing upon the question, we conclude that this amount is not so large as to indicate prejudice or passion on the part of the jury; neither is it demonstrable that, by mistake, the jury has made a wrong estimate which we should correct by requiring a remittitur. Finding no error in the record, the judgment of the court of common pleas will be affirmed.

*E. D. Potter*, for plaintiff in error.

*Cole, Whitlock & Cooper* and *Hamilton & Kirby*, for defendant in error.

### TRADE SECRETS.

[Circuit Court of Muskingum County.]

THE NATIONAL TUBE COMPANY V. EASTERN TUBE CO. ET AL.\*

Decided, 1902.

*Trade Secrets—Definition of—Rule Applicable to Employes in Possession of Trade Secrets—Individuality of a Pattern or Product not a Trade Secret, When—Equity—Injunction—Damages.*

1. A trade secret is a plan or process, tool, mechanism or compound, known only to its owner and such employes as it is necessary to confide it, in order to apply it to the uses for which it is intended; when discovered in any honest manner, the person making the discovery has the right of use.

\* Affirmed by the Supreme Court without report December 8, 1903.

2. An employe has no right to sell a trade secret evolved by his employer, nor to sell his services to another with the added value of his secret; but if the employe himself evolved the idea, the employer does not own it and can claim no further interest in it than the product of the skill, industry and intelligence of the workman.
3. Where the combined skill and experience of employes of a tube mill applied through a number of years results in a certain individuality in the construction of patterns and castings, such individuality does not amount to a trade secret from the use of which another may be enjoined.
4. But where the patterns themselves are wrongfully abstracted from the mill to which they belong for use in another mill, equity will enjoin such use.
5. An employe who effects such wrongful removal of patterns is the agent and vice principal of the company for whose benefit the patterns were wrongfully procured.
6. Jurisdiction will not be taken by a court of equity of an inquiry as to the amount of damages sustained, except where such an inquiry is incidental to other relief and for the purpose of disground for which relief was sought has vanished, jurisdiction of the cause will not be retained for the purpose of assessing damages of the entire controversy in one court; if the principal ages.

DONAHUE, J.; DOUGLASS, J., and VOORHEES, J., concur.

Heard on appeal.

This is an action filed in this court for an injunction to restrain the defendant company from using certain patterns and machinery cast therefrom, in and about its tube works in this city. The pleadings are long, and I shall not undertake to read them, but the issue, as we understand it, is this: The plaintiff claims that, during the time of the building of this defendant company's plant, a certain Harry Nuttall was in the employ of the plaintiff company; that the mill of the plaintiff had been in operation for something like twenty years, and in the course of that operation, had perfected, through the various stages of evolution, certain patterns that were strictly individual and distinct from the patterns of all other tube mills; that the shape and construction of these patterns were a trade secret; that about the time the defendant company was building its plant, it took into its employment the said Harry Nuttall, who was



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then in the employ of the plaintiff; that he was then in confidential relation, and in a position of authority with the plaintiff, and that he wrongfully, fraudulently and secretly took and carried away the patterns of the plaintiff, and had certain castings made for the use and benefit of the defendant company; that he could not have secured these patterns except by reason of his confidential employment; and plaintiff asks this court to enjoin the defendant company from the use of the castings made from these patterns; that a receiver be appointed to take charge of these castings and destroy them, and that damages may be assessed.

The defendant admits the taking and the use of patterns, the confidential relations of Nuttall, substantially as pleaded, but denies that the patterns were a trade secret and avers that these and like patterns were and are in common use; that artisans in that line of business had full knowledge of the character of the machinery and of the patterns and could easily and readily reproduce them, and that if any advantage was derived by it from the use of the patterns, it was not more than the saving of time and expense necessary to reproduce the same.

The first proposition, which must necessarily be conceded by the defendant, is that the plaintiff had a property right in these patterns, *i. e.*, in the thing itself; whether in the idea of the thing is another proposition, but in the pattern, the article itself, plaintiff had a property right.

The second proposition that must also be conceded, is that the use by Nuttall was wrongful and in breach of his confidential relations with the plaintiff. The acceptance of employment and salary from two rival concerns at the same time is, at least, deserving of censure. "No man can serve two masters; either he will love the one and hate the other or he will hold to the one and despise the other." We take it counsel will not care to dispute the authority in support of this proposition. No man in the confidential employment of a master, or of two masters, can be permitted to take the property of one without his consent and use it for the benefit of another. That is wrongful, whether the property be a trade secret or not.

The questions here presented are important in any view we take of it. The necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world. It is absolutely necessary that it should be protected and enforced by courts, and, on the other hand, it is a serious proposition for a court to lay forcible hand by injunction upon a large concern of this character, in which hundreds of thousands of dollars are invested and a large number of men are employed, and thereby, for the time, destroy its usefulness to owners, employees and the public, and it ought not to be done if relief can be had in any other way. It should be done only when the necessities of the case demand such stringent measures.

But if these patterns are trade secrets, then it can not be permitted that the defendant company here should have the benefit of the same, or of any of the castings made from the same, when the patterns were procured in the reprehensible manner charged and admitted; but if they are not trade secrets, if the idea of these patterns is known generally to the world, or at least to the people interested in that kind and character of business, then it can not be a trade secret, and plaintiff is not entitled to any protection as to the idea.

A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it, in order to apply it to the uses for which it is intended. It is not protected by patent, for the secret then is made public, and the inventor is protected by letters patent from infringement thereof; while, as soon as anyone fairly and honestly discovers a trade secret, either by examination of the manufactured products sold or offered for sale to the public, or in any other honest way, that person discovering it has full right to use the same. That is the risk the owner takes, and if he would have further protection, he must seek it in a patent. We believe that is the correct definition and the correct law of trade secrets, and we will not stop to cite authorities in support of it, because we believe none are necessary.

The question of defendant company's knowledge of the conduct of Nuttall is not, in the opinion of this court, of serious

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concern. He was an employe of the defendant corporation, charged with certain duties and possessed of certain powers to discharge these duties, and assisting in procuring these patterns was a part of his duties. Therefore, he was the agent and vice principal of the defendant, and his knowledge was defendant's knowledge, though defendant actually had no knowledge whatever of the transaction, and we are free to say that we do not believe that the elective officers of this corporation, *i. e.*, the directors and the officers selected therefrom, had any knowledge whatever of the procuring of these patterns in this way or of the uses to which they were to be put; but the very fact that they had no such knowledge shows that they had delegated that power, authority and duty to Nuttall, and relying upon him, they were giving no further attention to it. Therefore, his acts, for all the purposes of this case, are the acts and conduct of the defendant company.

If the patterns then are trade secrets, the injunction must be allowed and relief given as fully prayed for, for there is no contention but that Nuttall wrongfully used these patterns for defendant's use and benefit.

Now, what is the evidence upon this important question? The evidence seems to fairly demonstrate the fact that these mills had a certain individuality; that this individuality was the growth of experience, the evolution, as it were, of the tools and machinery used in and about the concern. One of the witnesses for the plaintiff—and I want to refer to one only (Mr. Bray)—has this to say (I read from page 165), being inquired of as to the several men who possessed the requisite knowledge and skill to reproduce a mill of this kind, he having said that there are such men:

“Q. Then these mills and the construction of them is a matter of purchase in the market, and there are a number of men in this country, at this time, who can do it? A. It is a question of engaging a competent engineer and a man to do the work.

“Q. The advantage of taking this pattern, you say, was a matter of several months time? A. Yes, sir.”

Now, at another place, he says that he can make a mill, and these other men can make a mill, approximately like the Penn-

sylvania Tube Works mill. The same can be said of the bricks in the walls of the buildings of this city. Each brick is approximately like the other, but there is no brick exactly like another brick. It is not possible, in the affairs of men, to reproduce any article more than approximately like another. The word "approximately" is subject to wide differences of meaning and shades of meaning. It may be exactly alike, so far as the human senses can determine, and on the other hand it may have a difference that we can determine by the ordinary senses, and yet be substantially the same; but we think that testimony of Mr. Bray is the strongest evidence in the record that the plaintiff has offered to this court, upon which it asks us to stop a mill in which there are invested, as we have said, hundreds of thousands of dollars, and in which there are a great many men employed. The balance of the evidence is all to the same effect. That there was some care taken of these patterns and some intention of keeping them from the public generally, there can be little doubt; but a trade secret, as we said a moment ago, is a secret, known only to the owner or proprietor of it and such of his employes to whom it is necessary to communicate the secret, in order that he may use them to advantage. It does not mean that, when I employ a man who has skill, knowledge, and experience in a particular line, ask him to furnish me the knowledge, and employ him because of his knowledge and experience, and he then supplies me an article, or does for me that which his skill, knowledge, and experience enable him to do, the idea or ideas he evolves become the property of the employer as a trade secret. That is not the idea at all. The trade secret must be in the mind of the man who discovers it, and he must be using that secretly, and the communication to his employe must be made for the purpose of better enabling that employe to discharge his duties as such. Then the fact that he communicated it to that employe does not permit the employe to sell it in the market or to sell his services in the market, where he can, with the added value of that secret; but if the employe himself knew the thing, if he is the one who brought the knowledge to the employer, the only property interest that the employer can claim is the product of his skill,

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the industry, and the intelligence of that workman, i. e., he owns the pattern, but he does not own the idea. If he would own the idea, he must contract not only for the services of this man but that he may have the idea that shall be developed through his experiments. In other words, the natural rule of right is this: That a man shall have the benefit of all his intelligent thought and enterprise, of all that he may discover by industry and ingenuity, and unless he contracts to sell some other man that idea, he may use it for his own benefit or for the benefit of any employer he may afterward find service with.

Therefore, if these mill owners desire to cripple a man's enterprise and his energy and intelligence, to hamper him in his future employment by requiring that he shall not give to that future employer the benefit of his skill or the things that he has developed for the former master, they must contract to that effect. Nothing but a specialty would control the natural rule of right in that case.

That was not done here. These patterns, whatever they were, were the result of the combined knowledge of men in the employ of the master. It is not even contended in this case that the corporation or the men constituting the corporation had any ideas on the subject themselves, but they went into the market, where skill, knowledge, and experience were to be bought, and they bought the use, but they did not buy the brain of their employees. All they can claim then is the product of the labor of these men, and that amount to the patterns and nothing more.

To illustrate, here are draughtsmen first required, then pattern makers, then the skilled mechanics of the mill. These three working together produce a certain individuality in a certain mill. This is natural, but that individuality can be transferred to another plant to-morrow by the draughtsmen, the pattern makers and the skilled mechanics resigning their employment with this master and taking service with another. There is no question about that, under the laws of this state or under the laws of any state. Therefore, we believe that if there was an individuality in these patterns, it was not a trade secret. We believe further, that these patterns could be reproduced by a

skilled workman; that is to say, there would be no functional differences whatever. There might be a flange here or a flare there, but the idea, the central, main idea has been in use, to the common knowledge of man, for at least seventeen years, according to the evidence. So, therefore, we find that there was no trade secret here, nothing that this court could protect, as a property right, in a secret.

It is contended further, on the part of the plaintiff, that there was such confidential relation existing between the defendant, Nuttall, and the plaintiff company, at the time that he procured these patterns, that a court of equity ought to enjoin from the use and benefits of the same. We think plaintiff is right in that contention. We believe this is a violation of his plain common duty to his master, such that a court of equity ought to reach out and stop by injunction. But stop what? Why, stop the use of these patterns, not the use of the idea, because we have now held that there is no property in the idea. Harry Nuttall, by his delinquency to his master, by his fraudulent conduct, by his breach of confidential relations, gave to this defendant company the patterns for castings. He did not give to them an idea that belonged to the plaintiff. If he had, this court would not hesitate a moment to grant the injunction prayed for, and to order every one of these castings broken, because, in such event, the company must bear the loss; it acted at its own peril; but he gave to this company the use of these patterns, and when he did that, if we had been called upon to enjoin it from using them, and to enjoin him from using them, we would have done so without hesitation; but when this action was planted, the use was over, the thing was accomplished that they sought to accomplish. Therefore, while the contention of plaintiff's counsel is right as to the law, the application of it is wrong, because it goes no further than to the thing that Nuttall's wrongful conduct gave to the defendant company, and he gave them only the use of these patterns. Now that exhausts the inquiry as to the question of an injunction being granted in this case.

That there has been a wrong committed here and that plaintiff has a remedy is equally certain. On the one hand, it is con-

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tended that the plaintiff should be sent out of court into another forum for that relief, and again it is urged that we should retain this case for relief, even though an injunction is not granted. We do not agree with this theory of counsel. An inquiry as to damage is the merest incident of a court of equity. It is simply because it is incidental to some other relief that a court of equity will take jurisdiction of it at all. It is because the experience of man has proven it to be better to dispose of a whole controversy in one court, if it can be done; but when the main reason for which the aid of a court of equity is sought has vanished, as we hold it has in this case, under our theory of it, there is no reason why we should retain it for the assessment of damages. The question of damages must be determined in some other forum, and with an order so that the question shall not be *res adjudicata* against this plaintiff, and so that it shall have a right to inquire as to damages in a suit at law, this petition is dismissed at the costs of the plaintiff and a motion for a new trial will be overruled, statutory time given for bill of exceptions, and thirty days for finding of facts. That will be the order and judgment of the court.

*Sullivan & Cromwell* and *Garfield, Garfield & Howe*, for plaintiff.

*F. A. Durban* and *Willis F. McCook*, for defendants.

**EDUCATIONAL INSTITUTIONS MAINTAINED BY ENDOWMENTS  
AND TAXATION.**

[Circuit Court of Lucas County.]

STATE, EX REL ATTORNEY-GENERAL, v. CITY OF TOLEDO.

Decided, February 1, 1902.

*Municipal Corporations—May Receive Property in Trust—Restrictions upon Trusts for Educational Purposes—Trustees under Section 4099 not a Corporation—Conveyance of Trust Property to City—Aid by Tax Levy not Unconstitutional—Broad Meaning of the Words "Arts and Trades"—Quo Warranto—Parties—Jurisdiction.*

1. An act of incorporation for the purpose of carrying out a trust is subordinate and subsidiary to the trust, and where the gift is for the establishment of an institution of learning, the purpose and object of the donor must govern; the Legislature has no power to change the trust; that can only be done by some act of those who have power over it.
2. Although such power is not expressly conferred, a municipality has authority to receive property in trust for educational and other purposes beneficial to its inhabitants.
3. Section 4105, as amended (94 O. L., 241), extending the provisions of Sections 4095 to 4104 to cities of the grade of Toledo, is not unconstitutional on the ground of special legislation nor for want of corporate power on the part of the municipality to receive and execute the trust.
4. A board of trustees appointed under Section 4099 and 4105 is not a corporation, but a legal board vested with certain powers; and the conveyance to the city of the trust property for the purposes for which it was originally dedicated does not deprive such trustees of the power vested in them under the original donation.
5. An institution founded for the purpose of promoting a knowledge of the arts and trades is within the line of that purpose when its curriculum of study qualifies those desiring to become artisans or artificers for the work they expect to do, and if this purpose is being accomplished it is immaterial whether the institution be called a university or a polytechnic school.
6. The fact that an institution, founded by private donation, receives money derived from a levy made by the board of education does not take the school out of the class known as private schools, nor is the levy of taxes as an aid in the support of such a school unconstitutional.



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7. *Quo warranto* does not lie to prevent a board from exercising an excess of power; the remedy against such action is injunction, and the offending trustees are necessary parties.

HAYNES, J. (orally); PARKER, J., and HULL, J., concur.

In this case a petition in the nature of an information in *quo warranto* has been filed in the name of the state, by the attorney-general, against the city of Toledo, setting forth at great and proper length the history of what is called the University of Toledo, and at the conclusion prays "for the advice of this court in the premises, and that the defendant be compelled to answer to the state of Ohio by what purport it claims to have, use and enjoy the liberty, privilege and franchises of conducting a university in the city of Toledo, and of devoting the proceeds of the several trusts herein set forth, and of the funds derived from taxation to such purpose, and that the defendant be ousted and excluded from any and all authority to conduct and maintain said Toledo University under and in pursuance of the several acts and sections of the Revised Statutes of Ohio hereinbefore set forth, and that the said defendant be compelled to answer to the state of Ohio by what purport it claims to have, use and enjoy the liberty and franchises of conducting the so-called polytechnic school as a department of the said Toledo University, with the curriculum herein set forth, and of devoting the proceeds of the said respective trusts, and of the levies hereinbefore mentioned, upon the property, real and personal, in the said city of Toledo for the said purpose; that the said defendant be ousted and excluded from any and all authority to use said fund, or any portion thereof, whether the same be derived from said trust, or from the proceeds of said taxation for the purpose of operating, maintaining and conducting said polytechnic school with said curriculum."

Counsel for the relator have, with commendable industry, set forth at length the various deeds, acts of incorporation, and statutes under which the present so-called university is conducted. A demurrer has been interposed by the city of Toledo to the petition, which raises substantially all the questions, I think, that can be raised in regard to the matters in controversy.

We realize the importance of the questions involved to the institution and to the city of Toledo, and we have endeavored to give to them a very full, careful, and thorough examination. I shall not be able, however, to review at any very great length the various authorities cited, or, perhaps, the various questions that have been raised. I shall content myself with stating as briefly as possible the points upon which we think the case turns, and cite a very few authorities upon those points. I shall necessarily be rather long. It may tire your patience, but there are so many matters involved it is impossible to state them clearly unless at some length.

The petition sets forth that the defendant "has heretofore misused and abused, and is now misusing and abusing, its franchises, privileges and rights conferred upon it by law, and claims to have, hold and exercise franchises, rights and privileges in contravention of law, as hereinafter more thoroughly and completely set forth. That on October 12, 1872, there was incorporated under the general laws of state of Ohio a corporation known as the Toledo University of Arts and Trades, the incorporators thereof being Jesup W. Scott, Frank J. Scott, William H. Raymond, Sarah R. L. Williams, Charles W. Hill, and Albert E. Macomber. That under said articles of incorporation there was then and there created for the purpose of receiving and executing certain trusts hereinafter mentioned and described, the following trustees: William H. Scott, Frank J. Scott, Maurice A. Scott, Richard Mott, Sarah R. L. Williams, William H. Raymond, Albert E. Macomber, Charles W. Hill; and the following *ex officio* members, to-wit, the superintendent of the public schools of Toledo, the mayor of the city of Toledo, and the governor of the state of Ohio."

It states that the third paragraphs of the articles of incorporation declared that the fund to accept the trust for which this corporation has been formed consists of 160 acres of land (describing it), the same being valued at \$80,000, and being the gift of Jesup W. Scott; also such other funds or property as from time to time be given or acquired for the purpose of this trust. The sole object of said incorporation and of the trust set forth in the fourth of said articles of incorporation is as follows, to-wit:

“The object of this trust is to establish an institution for the promotion of knowledge in the arts and trades and their related sciences by means of lectures and schools; by extensive collections of models and representative works of art; by geological and mineralogical or other cabinets and museums that relate to the mechanic arts, and whatever else will serve to furnish artists and artisans with the best facilities for a high culture in their professions; also to furnish instruction in the use of phonographic characters and to aid their introduction into more general use.”

Then follows this paragraph, to which I call attention, because we may have to refer to it hereafter:

“Other branches of learning not included in the above specifications may become a part of the institution when endowed so as to be sustained without the use of the trust funds hereinafter provided. All the advantages offered by this institution are to be free of cost to all pupils who have not the means to pay for the same, and all others are to pay such tuition and other fees as the trustee may require. The institution shall be open to pupils of both sexes alike.”

These articles were duly executed and recorded upon October 22, 1872. Seven days thereafter Jesup W. Scott and Susan Scott, his wife, executed and delivered to the trustees a certain conveyance, as follows, the material part, after giving a description of the lands conveyed, being the following:

“This conveyance is made to the said trustees in trust for the following objects and purposes, and subject to the following conditions, to-wit: To establish an institution for the promotion of knowledge in the arts and trades and the related sciences, by means of lectures and oral instruction; of models and representative works of art; of cabinets of minerals; of museum instructive of the mechanical arts; and of whatever else may serve to furnish artists and artisans with the best facilities for a high culture in their respective occupations, in addition to what are furnished the public schools of the city; also to furnish instruction in the use of phonographic characters and to aid their introduction into more general use, by writing and printing, and also to encourage health-giving, invigorating recreations. All the advantages of the institution shall be free of cost to all pupils who have not the means to pay, and all others are to pay such tuition and other fees and

charges as the trustees may require, and be open alike to pupils of both sexes. All incomes from leases of lands herein conveyed shall, after paying necessary charges and improvements, be expended by said trustees to accomplish the objects herein stated."

Then it provides for platting and dividing the lands, and for renting the same.

The allegation of the petition follows "that said conveyance was made solely and only for the purpose as set forth therein, as follows, to-wit;" and repeats the declarations in regard to the parts that I have already read. The deed was duly recorded.

Afterwards, to-wit, on November 19, 1872, said Jesup W. Scott and Susan Scott, his wife, duly executed and delivered to the said trustees a conveyance referring to said conveyance of October 21, 1872, in the following words—and here follows the statement of the deed:

"Whereas, in our deed of trust to found the Toledo University of Arts and Trades, bearing date October 21, 1872. \* \* \* We have limited the employment of income to furnish facilities for technical education in addition to those furnished by the public schools. \* \* \* Now we do hereby qualify said limitation so that these funds may be used in conjunction with and as a part of any educational fund for the promotion of the kind of education embraced in the deed of trust which may hereafter be furnished by state or city, or by the general government of the United States, subject to such conditions and agreements as the trustees of the university and the authorities having the disbursement of the fund may unite in making."

Note this: "We \* \* \* hereby qualify said limitation so that these funds may be used in conjunction with and as a part of any educational fund for the promotion of the kind of education embraced in the deed of trust which may hereafter be furnished by state or city, or by the general government of the United States," etc. And the allegation of the petition is that this deed "was made for the purpose as therein set forth, of modifying the conditions by the following words," being the words I have read.

"That shortly subsequent thereto William H. Raymond gave in trust to said University of Arts and Trades, for the purpose

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of carrying out the trust in accordance with the aforesaid articles of incorporation, the sum of \$15,000. That afterwards, to-wit, on the 5th day of February, 1874, Susan W. Scott, widow of said Jesup W. Scott, William H. Scott, Frank J. Scott, and Maurice A. Scott, heirs at law of said Jesup W. Scott executed and delivered their certain warranty deed, whereby they conveyed certain property to the said trustees of the University of Arts and Trades, in words and figures as follows:"

This was a warranty deed without any qualifications.

"That on April 1, 1873, Albert E. Macomber and wife conveyed certain real estate in said conveyance contained to said trustees of the University of Arts and Trades in a duly executed and delivered conveyance in the following words and figures, to-wit:"

Then follows the deed, describing the premises, and is also a warranty deed made to the trustees, without any other qualification.

"That by the said several conveyances there was transferred to the said University of Arts and Trades the several pieces and parcels of land in said conveyances described, the same to be used solely and only for the purposes set forth in the said articles of incorporation and in the said deed of Jesup W. Scott and Susan W. Scott, dated October 21, 1872, and the qualifications thereof set forth in the deed dated December 19, 1872; said restrictions and qualifications being identical with those set forth in the articles of incorporation of said Toledo University of Arts and Trades."

Up to that time we have a corporation formed, called the Toledo University of Arts and Trades, for certain specific purposes. The contention of counsel for the relator is that these articles of incorporation and these deeds stamp their character not only upon the whole of the subsequent acts that have been passed, but upon all that has been done for the purpose of maintaining and continuing this university; that their limitations and restrictions are still binding and obligatory upon the institution which is called the Toledo University.

We agree with counsel in that contention. The corporation that is here formed is a corporation formed for the purpose of carrying out the wishes and trust of its founder, Jesup W. Scott.

He sought to establish an institution of learning of such a character and for such purposes as he deemed proper, and which he deemed to be useful and beneficial to his fellow-men. He had a right to place such conditions upon the trust which he created as he saw fit. The act of incorporating the university, while made under the general laws of the state of Ohio, was made for the purpose of carrying out and facilitating and protecting in perpetuity the objects of this trust fund, and is subsidiary to that trust.

This question has been argued and decided in the very celebrated case, *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.), 518. It will be remembered that Dartmouth College was originally founded for the purpose of educating Indian children in Christianity, and also for some further purposes of education therein specified. It was subsequently sought by the Legislature of the state to take control of that school and appoint new trustees. The case came up and was argued, and was finally appealed to the Supreme Court of the United States. The argument of Mr. Webster in the case was very full and complete upon this point; that the donor of the fund and the founder of the trust could not only stamp upon that trust the characteristics which he desired, *but* that no person had a right to change or alter them; that no state authority had a right to change or alter them. Although a corporation was formed under the authority of the king of England, still the position seemed to be well sustained, that the act of incorporation was simply an incident to the character and use of the trust, and was made not to control the trust, but for the purpose of perpetuating and protecting the trust itself, and was subservient to the objects and purposes of the trust, as declared by the founder of the trust or donation. That view was taken in the very able opinion of Chief-Justice Marshall.

So that the purpose of Mr. Scott, the purposes and objects of this donation, as stated in his deed of trust, the purposes of the donation, as perpetuated and carried out by the articles of incorporation, which were in accordance with the deed of trust, must govern this institution all the way through, unless by some act of those who have power over the fund—the heirs

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at law, for instance, of Jesup W. Scott, or by the trustees, acting within their corporate power—some change is made.

The Legislature had no power to change or alter this trust without the consent of the trustees, nor did they do so, or profess to do so.

The petition sets forth that there was passed for the government of the city of Cincinnati on April 16, 1870, a certain act of the Legislature, whereby the common council of the city of Cincinnati, described as a "city of the first class, now having a population of 150,000 or more," was authorized and empowered to receive donations of land that might have been conveyed in trust, or should thereafter be conveyed in trust, for the purpose of establishing schools and universities. I shall not go through the reading of the law; it is too lengthy. Subsequently, on April 16, 1873, an act was passed (being Section 4105, Tit. III., Chap. 14, Revised Statutes), by which the Cincinnati act was made applicable to the city of Toledo, except that "the board of directors shall consist of thirteen members and the rate of taxation to be assessed and levied shall not exceed one-half of one mill on the dollar of the taxable property of said city." In brief and in substance that act is, that in this city and as to it, "The common council of the city of Toledo, in the name and behalf of said city, may accept and take any property or fund heretofore or hereafter given to the city, for the purpose of founding, maintaining or aiding a university, college or other institution for the promotion of free education, and upon such terms, conditions or trusts not inconsistent with law, as the common council may deem expedient and proper for that end."

This statute enables the trustees of the trust fund to make a conveyance; and that is true, as we understand it, in regard to the trustees of this university; the trustees were authorized to make a conveyance of the property that had been deeded to them by Jesup W. Scott to the city of Toledo for the purpose of carrying out the trust. They were not deprived of the trust in that the city undertook to take it away from them or deprive them of it without their consent, but they were authorized to take this step. (And I may say in passing that that was finally

done by a resolution of the board, in which board the heirs at law of Jesup W. Scott were members, and in which they were, it seems, consenting).

Briefly, then, this property was authorized to be conveyed to the common council of the city of Toledo in trust for the uses and purposes to which it had originally been dedicated; and it was provided that there should be a board of trustees, originally thirteen in number, afterwards reduced to five. Section 4099, Revised Statutes, provides:

“As to all matters not herein or otherwise provided by law, the director shall have all the authority, powers, and control vested in or belonging to said city, as to the management and control of the estate, property, and funds given, transferred, covenanted or pledged to the city for the trusts and purposes aforesaid, and the government, conduct, and control of the university, college or institution so founded; they may appoint a clerk, and all agents proper and necessary for the care and administration of the trust property and the collection of the income, rents, and profits thereof, may appoint the president, professors, tutors, instructors, agents, and servants necessary and proper for such university, college or institution, and determine their compensation; may provide all the necessary buildings, books, apparatus, and means and appliances, and pass all such by-laws, rules, and regulations concerning the president, professors, tutors, instructors, agents, and servants, and the admission, government, and tuition of students, as they deem wise and proper; but they may, by suitable by-laws, delegate and commit the admission, government, management, and control of the students, course of studies, discipline, and other internal affairs of such university, college, or institution, to the faculty which the directors may appoint from among the professors.”

On January 18, 1884, the trustees of the Toledo University of Arts and Trades passed a resolution as follows:

“Resolved, That the entire property included in the trust under which the corporation is organized and the subsequent donations in trust received from William H. Raymond, Susan Scott, William H. Scott, Frank J. Scott and Maurice A. Scott be tendered to the city of Toledo on condition that the city will assume the trust under and by virtue of the power conferred in Sections 4095 to 4105, inclusive, of the Revised Statutes of Ohio.”



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Subsequently the common council of the city of Toledo passed the following resolution:

“Resolved, That the proposition made by the trustees of the University of Arts and Trades be, and the same is hereby, accepted.”

On February 28, 1884, the president of the trustees of the University of Arts and Trades was authorized to make a deed of conveyance of all the trust property belonging to the said University of Arts and Trades to the city of Toledo, and on July 3, 1884, the said trustees of the Toledo University of Arts and Trades, by its president, Richard Mott, duly conveyed all its real estate and other property to the city of Toledo, and that deed of conveyance is set out in the petition. The concluding part is as follows:

“All of the said lots and parts of lots being in the city of Toledo, in the county of Lucas and state of Ohio. Said real estate is hereby conveyed to the city of Toledo subject to the conditions upon which the same was received by the University of Arts and Trades, namely, the promotion of industrial education.”

The petition then recites that “on March 18, 1884, the common council of the city of Toledo established a university under an ordinance duly passed therefor in words and figures as follows:”

Section 678 reads as follows:

“There is hereby established a university for the promotion of free education of the youth of both sexes within the city under and by virtue of Chapter 14, Title III, Revised Statutes of Ohio, to be styled and known as The Toledo University.”

This is followed by several other sections, and Section 683 reads:

“The first department of such university to be opened shall be designated and known as the Manual Training School, and shall be devoted to instruction in the practical arts and trades.”

The petition then states that immediately after the passage of the said ordinance, the said city, in accordance with the provisions of Section 4098, Revised Statutes, appointed certain directors of the university, and the said directors organized

under said appointment, and proceeded to administer the trust, etc. It then recites the fact that a lease was made with the city board of education by the directors for a site for the manual training school, upon which a building was erected. The preamble of that lease is as follows:

“Whereas, it is considered desirable that manual instruction should be furnished to the pupils of the Toledo high school in addition to the studies now pursued, and the Toledo University having made a tender to the board of education of the city of Toledo, Ohio, to furnish said instruction in manual training, and to construct and equip a suitable building for such purpose, providing a site for the erection of such building can be obtained convenient to the Central high school, and it being considered that the most desirable site for such manual training school building is a point immediately adjacent to said high school building, on the northeast side.”

They therefore proceeded to make a lease, and upon that a building was erected, in which a manual training school has been conducted for a great many years.

The petition states that there was also passed an act by the General Assembly, on April 11, 1885, amending Section 4103, Revised Statutes, reading as follows:

“The common council of the said city may set apart and appropriate as a site for the buildings and grounds of the university, college or institution so founded, any public grounds of the city not especially appropriated or dedicated by ordinance to any other use or purpose, any law to the contrary notwithstanding; and the board of education of said city may also for a like purpose set apart, convey, or lease for a term of years any ground owned by such board.”

The petition avers that the grounds were set apart and used, and were a part of the grounds owned by the board of education. It then sets up a decree of the court of common pleas in regard to the platting of the land, which in our judgment is immaterial at this point, and which I shall pass. It went to the platting of the one hundred and sixty acres, and the manner in which it should be platted.

On April 9, 1873 (70 O. L., 117), the Legislature passed an act entitled “An act supplementary to an act to enable cities

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of the first class to aid and promote education, passed April 16, 1870," reading as follows:

"Be it enacted by the General Assembly of the state of Ohio, that the above act shall be applicable to cities of the first class with less than 90,000 and more than 31,500 inhabitants by the last federal census; provided, that in such cities the number of directors shall consist of thirteen, and, provided, that the rate of taxation to be assessed and levied on the taxable property of said city shall not exceed one-half of one mill on the dollar valuation thereof, to be applied by said board of trustees to the support of such university, college or institution of learning."

And that is recited in the petition.

Section 4105, Revised Statutes, as amended April 6, 1900 (94 O. L., 241), was amended so as to read as follows:

"That the provisions of this chapter shall be applicable to cities of the third grade of the first class, except that the rate of taxation to be assessed and levied shall not exceed one-half of one mill upon the taxable property of such cities; and except that the board of directors or trustees shall consist of five members and shall be filled by appointment from persons of approved learning, discretion and fitness for the office, by the board of education and confirmed by the common council in the city in which such university shall be located; such appointments shall be made within thirty days after the passage of this act and one member shall be appointed for one year," etc.

Thereupon five directors were appointed, and the relator says they are now exercising their powers of office.

Section 4104, Revised Statutes, provides that the board of education of the city may, upon the application of said board of directors, assess and levy a tax on the taxable property of the city, and this petition avers that it has been the habit of the board of education to determine the amount that is necessary to be raised upon the request of the directors of the university, and that there has been levied from time to time, from 1884 to 1899, various sums, which are set out in detail in the petition.

It then sets forth—

“That shortly after the appointment and qualification of the said board of directors of the Toledo University under the provisions of the act of April 16, 1900, the said directors of the said Toledo University established a school under the name of The Toledo Polytechnic School as a department of said Toledo University, in which department they propose and have since conducted a school wherein is taught secondary and academic studies, similar and like unto those ordinarily taught in high school and college preparatory departments, and courses of studies not included in or allowed by the several trusts hereinbefore set forth; and such polytechnic school is not for the promotion of knowledge in arts and trades and the related sciences, and is not designed to furnish artists and artisans with best facilities for a high culture in their respective occupations and industrial education, and is contrary to the trusts heretofore referred to.”

Then it sets forth their curriculum, and states that there is great doubt about the right of the board of trustees to do that, and asks that that may be inquired into. It also avers that “at the time of the passage of said several acts the city of Toledo was the only city of the third grade of the first class in the state of Ohio, and no municipality did or could become a city of the third grade of the first class between April 16, 1900, and thirty days thereafter.” And then the petition proceeds to aver that the various acts with regard to the city of Toledo and this school, and the acts of the common council under the same, are in violation of the various articles of the Constitution of the state of Ohio, especially Section 1 of Article XIII and Section 6 of Article XIII, which relate to incorporations; and that the levying of taxes for the purpose of maintaining this school is in conflict with Section 19, Article I of the Bill of Rights of the Constitution. The petition sets forth that these various acts are acts of a general nature, but not of uniform operation throughout the state, and is in violation of Section 26, Article II of the Constitution of the state. It states these various propositions in various forms, and winds up with a prayer which I have already read.

We have seen that the conveyances were made by the board of trustees to the city of Toledo in regard to these trusts, were made upon the same conditions and same trusts as they had been received by the trustees or directors from Jesup W. Scott.

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And they were accepted by the city of Toledo upon the same trusts.

It is claimed here first that these acts are wholly unconstitutional, and that all these various acts of the Legislature that permitted the city of Toledo to receive these trust funds or to act upon them are in violation of the Constitution, and are void. That question is an important one, and has been very fully argued by counsel for relators, and upon the first view it seems to be a very strong point. We have discussed it at some length, and the question was raised in our consultation room as to the character of this transaction between the board of trustees and to be a very strong point. We have discussed it at some length, and the question was raised in our consultation room as to the

We therefore commenced some researches in regard to that the city of Toledo, and as to the character of the powers that were sought to be conferred by these acts on the city of Toledo; and the question was raised whether or not the city was in fact receiving any corporate power by virtue of these statutes, and was exercising any corporate power in attempting to carry them out.

We therefore commenced some researches in regard to that question, and were rewarded by finding some cases that we think shed a good deal of light on this question.

In Chapter 15, Section 437, of Dillon on Municipal Corporations (2d Ed.; in a later edition, Section 567), the question is discussed as to the power of municipal corporations to receive property upon trust of the character of which this was, and their right to execute those trusts and to carry out the purposes of the trust; and the general principles were laid down there that they have the right to receive property in trust, at least along the line of the general powers of the corporation, or for purposes that would be beneficial to the inhabitants of the corporation, even if they were to extend a little beyond the ordinary powers of the corporation. More than that. We came upon *Perin v. Carey*, 65 U. S. (24 How.), 465, a decision of the Supreme Court of the United States in which certain parties had invoked the action of the courts in regard to the very colleges, as we understand it, that are referred to in these acts

that I have cited, whereby powers were conferred upon the city of Cincinnati to receive trusts and exercise them, etc. The case is more generally known, however, as the McMicken will case. Charles McMicken, a citizen of Ohio, made his will in 1855, and died in March, 1858, without issue. So it will be seen that this will was made, and that all the matters in controversy in that case arose and occurred after the adoption of the Constitution of 1851, and before this act was passed which has been referred to. The case was argued by Mr. Headington and Mr. Ewing on behalf of the heirs, and Mr. Pugh and Mr. Perry and Mr. Taft on behalf of the city. Mr. Taft and Mr. Perry also filed very extensive briefs. It was very fully and ably argued by these masters of the law. The case was one in equity, and was a bill filed by the heirs of Charles McMicken to set aside the will. It sets forth a great variety of reasons why the will should not be carried out or executed, and why the city of Cincinnati could not receive the same or execute the trust. These points were all argued, eventually, at great length and with great learning. The opinion was delivered by Mr. Justice Wayne, and he devoted about twelve pages of the opinion to a general discussion of bequests and trusts, and the rights of corporations to receive the same. I will read a portion of it:

“The testator says: ‘Having long cherished the desire to found an institution where white boys and girls may be taught, not only a knowledge of their duty to their Creator and their fellow-men, but also receive the benefit of a sound, thorough and practical English education, and such as might fit them for the active duties of life, as well as instruction in all the higher branches of knowledge, except denominational theology, to the extent that the same are now or may be thereafter taught in any of the secular colleges or universities of the highest grade in the country, I feel grateful to God that through his kind providence I have been sufficiently favored to gratify the wish of my heart.’”

I would say that this will contains much broader provisions than in the case at bar.

“‘I therefore give, devise, and bequeath to the city of Cincinnati, and its successors, for the purpose of building, establishing and maintaining, as far as practicable, after my decease,

two colleges for the education of boys and girls, all the following real and personal estate, in trust forever, to-wit:’ describing the property in nine clauses of the thirty-first article of the will.”

The thirty-fourth article of the will is a direction that the Holy Bible of the Protestant version, as contained in the Old and New Testaments, shall be used as a book of instruction in the colleges. Next, it is declared that in all applications for admission to the colleges, that preference should be given “to any and all of the testator’s relations and descendants, to all and any of his legatees and their descendants, and to Max McMicken and his descendants.”

“Then he directs: ‘If after the organization and establishment of the institution, and the admission of as many pupils as in the discretion of the city may have been received, there shall remain a *sufficient surplus of funds*, that the same shall be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents are living, etc., etc., preference to be given to my relations and collateral descendants, etc., etc.; that they were to receive a sound English education, etc., etc., and afterwards, directions are given as to the mode of receiving such poor white male and female orphans, and the privileges to be allowed under certain circumstances.’

“The testator, in the thirty-fourth article of his will, declares that—

“‘The establishment of the regulations necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors of said institution.’”

It was his intention primarily to establish two colleges for boys and girls, and then the third for the support of poor white male and female orphans, neither of whose parents were living, and who were without any means of support, who were to receive a sound English education. This third school was to be founded by applying to the purpose the surplus funds which might remain after the complete organization of the college.

I shall take the liberty of reading at some length from the decision, because it states the law better than I can state it:

“We shall now consider the objection which were made by the counsel for the appellants to the validity of the devises and bequests of Mr. McMicken, that the city of Cincinnati has not the capacity to take them and to execute the trusts of the will, and that no other trustee can be appointed.

“In our view, the answers to them from the opposing counsel were decisive. No incapacity of the city of Cincinnati to take in this instance can be inferred from its charter. It has the power to acquire, to hold and possess, real and personal property, etc., etc., and to exercise such other powers and to have such other privileges as are incident to municipal corporations of a like character and degree, not inconsistent with this act of the general laws of the state (Swan, 960). It was admitted in the argument that the section just read confers power upon the city to acquire and hold real estate for the legitimate objects of the city. These objects are enumerated in many particulars directly connected with its powers to govern the city, and in the nineteen sections following that cited there is not a sentence or word from which an inference can be made that the Legislature meant to deprive the city of Cincinnati from taking and administering charitable trusts. Indeed, such a course would have been inconsistent with the Legislature's caution in its enactments under the Constitution of 1851. It would be doing great injustice to the Legislature even to suppose that it meant, in passing an act for the government of corporations, under the provisions of the Constitution, that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long-established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors. So from any intention to interfere with such a privilege in the city of Cincinnati, we infer from previous and subsequent legislation that it was to have an important agency in carrying out the sixth article of the Constitution in respect to education. We allude to the act for the better organization and classification of the common schools in Cincinnati and Dayton, passed in the year 1846 (44 O. L. L., 91), and to that of January 27, 1853, both now in force. In the first, the trustees and visitors of common schools in the city of Cincinnati, with the consent of the city council, have the power to establish and maintain out of any funds under the control of the trustees and visitors such other grades of schools than those already established as they may deem expedient for such purpose. Further, by Section 68 of the State School Law, Swan, 852, passed in January, 1856, power is given to town-



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ship boards of education, and their successors in office, to take and hold in trust for the use of central and high schools, or sub-district schools, in the township, any grant or donation, or bequests of money, or other personal property, to be applied to the support of such public schools. Again, in 53 O. L., 33, March 26, 1856, it is declared that whenever any one gives land or money for the endowment of a school or academy, not previously established, and shall not provide for the management of it, that the court of common pleas shall appoint trustees with corporate powers. That act provides also for the management of charities when the founders have not given directions; and another act, Swan, 193, 1856, provides how colleges may be incorporated by their own act, and how trustees of an endowment may also become a corporation by their own act. These acts have been cited to show that Ohio, in her legislation, has made municipal corporations trustees for charity devises and bequests, and that the management of them is a duty. They also prove that the privilege to take them is one given and imposed by law.

“After a close examination of all the legislation of Ohio relating to corporations, and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the Constitution of 1851, in respect to a corporation in receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of donor. To take such privileges from them can only be done by statute expressly, and not by any implication of statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purpose of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects,

if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers (*Vidal v. Girard*, 43 U. S., 126, 190). This court announced the same principal again in the case of *McDonough v. Murdoch*, 56 U. S., 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio statute of wills to prevent corporations from taking by devise. Much was also said in the argument denying the legality of the trusts, in consequence of the uncertainty of the beneficiaries, and because the relatives of the testator were to have the preference. As to the first, white boys and girls make as distinctive a statute of a class who are to be the first beneficiaries of the trust, and words of the thirty-sixth section, that 'if any surplus shall remain, etc., it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support,' makes as certain a description as could have been expressed.

"It seems to us, now, that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, c. 4, but to a charity under the common law. The answer is, that a charity is a gift to a general public use, which extends to the rich as well as to the poor (*Jones v. Williams*, Amb., c. 651). Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses, under the statute of Elizabeth (*Attorney-General v. Earl of Lansdale*), but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the testator. And we can not be mistaken, that a devise to a corporation in trust for any person is good, and will be effectuated in equity (1 Bro. Ch. Cas., 81). And *a fortiori*, a devise to a charitable corporation, in trust for any other charitable use, would be good. All property held for public purposes is

held as a charitable use, in the legal sense of the term charity. Law Library, Vol. 80, p. 116, Grant on Corporations.

"We will not pursue the subject further; for, without having discussed either of the six objections made in the bill of the complainants, or the points made by counsel in support of the demurrer to the bill, numerically, both have been under our examination; for all were appropriately in the argument of the cause, and in th siopinion we mean to decide them all, and have done so.

"We can not announce them more expressively than they were urged in argument:

"1. The doctrines founded upon 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio, but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.

"2. The English statutes of mortmain were never in force in the English colonies; and if they were even considered to be so in the state of Ohio, it must have been from that resolution by the governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.

"3. The city of Cincinnati as a corporation is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

"4. Those devises and bequests are charities, in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the state of Ohio.

"5. McMicken's direction, in Section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

"6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

"7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor while male and female orphans.

"8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

“This cause was argued on both sides with such learning and ability, that we feel it to be only right to the profession to acknowledge the assistance given us in forming our conclusions; and our only regret is, that it should necessarily have extended this opinion to a greater length than we wished it to be.”

We think that case decisive of this upon the principal questions involved. We think that case clearly, amply and fully decides that the city of Toledo, irrespective of any special statutes, was fully authorized or empowered to receive this trust, and that these acts that have been referred to in no way affect the right of the city to receive the trusts. The city had the right to receive the trusts and to execute them. A court of chancery, if called upon, would appoint the necessary trustees.

However, it seems to us that the conclusion to be arrived at from this decision, from the character of this trust, is that this is a private matter, and not one of a general nature. It is a college, a university, for a specific, definite purpose, originally founded as such, and carried forward in the various acts by these various statutes as such—a school, not one for a body of men, but for all citizens in the city. Perhaps no other city in the state but the city of Cincinnati would have a school or a college of that kind. Indeed, I do not think that there is another one in the state of Ohio. And we are of the opinion that these various acts, in their application to this school, are in their nature such as may be passed by the Legislature of the state of Ohio and not be in violation of any provisions of the Constitution.

Under these statutes, passed lawfully, the city has the naked legal title to this property. It has the power to confirm the nominations of trustees which are made by the board of education. Beyond that, the whole power of management of this trust and of these schools is placed in the board of trustees. I have read Section 4099, Revised Statutes, and I will not read it again; but it confers all the powers that have been exercised in regard to these schools upon the board of trustees, and this board of trustees is not a corporation. The trustees are not endowed with corporate powers. If authority is necessary upon that, the decision of the Supreme Court of the state of Ohio in

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*State v. Powers*, 38 Ohio St., 54, decides that even boards of education are not corporations within the provisions of the statutes of the state of Ohio in regard to corporations.

The law does not profess to incorporate the trustees. *State v. Davis*, 23 Ohio St., 434, also is a case in support of the proposition that they are not an incorporated body, but are simply endowed with certain powers. Therefore, the objection that is made that these acts confer corporate power upon the city of Toledo, and that therefore they are void, we think falls to the ground.

But if they were void, what then? They would only be void in regard to the exercise of those powers. That would not affect the trust. The trust would remain in the city and a court of chancery would have full power to appoint trustees to carry out the trusts. But that law, in our judgment, is clearly constitutional, and this board is a legal board, and may carry out the provisions of this trust.

There is another proposition in this petition that is brought to our attention, and that is in regard to the so-called polytechnic school. In the view that we take of the case, that the power of the control of this university is vested in the board of trustees, we are of the opinion that this question can not be properly raised in this petition in *quo warranto* without the presence of the members of the board of trustees, at least. We suggest, without deciding, that perhaps it can not be raised at all in this action or in this form of action.

I want to go back a little now—to the formation of this institution. It was formed as the University of Arts and Trades. It was incorporated for the promotion of knowledge in the arts and trades and their related sciences, and to furnish artists and artisans with the best facilities for a high culture in their profession. That character adheres to it to this day, save and except the trustees have brought this under the other clause of the trust; and that is, that other branches of learning not included in the prescribed list may become a part of the curriculum, may become a part of the institution “when endowed so as to be sustained without the use of the trust funds herein provided.” If a time shall come when new endowments are

made upon this institution to such an extent that they may carry forward the institution for the promotion of all kinds of education in arts and sciences, or any different department of learning that they see fit to carry forward, provided the endowments are such as to do this without diverting this fund, they may do so. The fund at present yields about \$800 per annum. It may be claimed that because the money is raised by taxation to conduct this school, that therefore the time has come when they can do that—when they can extend their branches of education to any department that they see fit. That may be a question of very serious importance. The object of this trust is to “establish an institution for the promotion of knowledge in the arts and trades and their related sciences, by means of lectures and schools; by extensive collections of mineralogical or other cabinets and museums that relate to the mechanic arts, and whatever else will serve to furnish artists and artisans with the best facilities for a high culture in their professions.” The construction of that should be this: The board of trustees having charge of this school, and carrying out the object and purpose of the founder in regard to the promotion of the arts and trades and their related sciences, would have a wide discretion as to what may be taught in the school. The object is to qualify men for work in art. I do not mean technical art, but in the arts and in the trades. You will find by an examination of the definition of the word “arts” that it has a very broad significance. It relates to the adoption of material means to useful purposes. The word “trades” is an exceedingly broad word. Now, whatever will qualify men, artisans, artificers, for the work for which they are destined, which they desire to carry on, may be taught in this school. They can teach no more than that. They may undertake to call it a university, but that does not change the nature of the school or its character. They may call it a polytechnic school; that does not change the character of the instruction that should be given there—whether they call it a polytechnic school or class in natural philosophy, or class in chemistry, no matter about the name. The substance of the thing is, they may teach all that is related to the objects and purposes for which the school is founded, and noth-

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ing further, except, as I have already stated, they obtain donations enough to go beyond that.

Whether the question can be raised here or not we are extremely doubtful, even if the members of the board of trustees were made parties. In *State v. Board of Ed.*, 7 C. C., 152, and in the case of *State v. Newark*, 57 Ohio St., 430, which also cites *State v. Board of Ed.*, *supra*, there are references made to this law and to this doctrine. It is also reviewed in the text books. And the view seems to be, without stating it accurately, somewhat like this: First, that there can be no power exercised in *quo warranto* except it be an ouster of the board; that is, if there be an excess of power, it must be reached by another method, to-wit, by a court of chancery by way of injunction. *Quo Warranto* is treated, and always has been, as a matter of law; but corporations being under the control of chancery courts they may be called to account in those courts as to whether they are exceeding their powers. There is perhaps this qualification running through it all; if the body goes so far beyond any powers as to encroach upon the sovereign power; or, as stated at common law, upon the power of the king in derogation of his power, usurping his powers, then the writ of *quo warranto* may lie to the extent that such powers are usurped.

Take the case at bar. This board of trustees is authorized by the terms of the trust to establish an institution for the promotion of knowledge in the arts and trades and their related sciences. They cause education to extend to this branch and that branch, and in the performance of their duty they may step beyond their power and may teach something that in the judgment of some men may not be related to the proposed school, and which may not, either remotely or immediately, qualify men for the performance of those duties connected with the arts and trades. A writ of *quo warranto* to oust the board would not lie. The proper method would be to invoke the aid of a court of chancery to restrain the trustees from causing those branches of education to be taught.

As I have said, we will make no order in regard to that without the presence of the board of trustees as parties, because, under the view that we take, the whole matter is within their

power. The common council itself established the manual training school, but the board of trustees established the so-called polytechnic school. It is not an act of the council; it is the act of the trustees. Hence, they should be made parties. We make these suggestions in regard to the matter, so counsel may take it under advisement, if they desire to, and take such course as they see fit.

Now, it is said that the levying of the taxes for the school is opposed to the provisions of the Constitution of the United States, especially Section 19, Bill of Rights. I call attention now to some sections of the Constitution of the state of Ohio. Section 7, Article I of the Bill of Rights provides:

“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the right of conscience be permitted. No religious test shall be \* \* \*. Religion, morality and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”

Well, now, if they may do that by law, they do it through corporations or through any other boards that are subsidiary means for carrying the objects and purposes of the corporation. Article VI, Section 1 of the Constitution provides:

“The principal of all funds, arising from the sale, or other disposition of lands or other property granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate and undiminished.”

That relates to the school fund of the state.

“Section 2. The General Assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious



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or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."

In the Municipal Code, paragraph 34 of Section 1692, it is provided that the common council shall have power "to acquire by purchase, or otherwise, and to hold real estate, or any interest therein, and other property for the use of the corporation, and to sell or lease the same." That was in the same general line that was referred to by the Supreme Court of the United States. It is said that the raising of money by taxation for the support of this school is in violation of the Constitution of the state—Section 19, Article I of the Bill of Rights, which provides that "Private property shall ever be held inviolate, but subservient to the public welfare," etc.

This school has been founded for a most laudable purpose; it has been carried forward in one of its branches in a most useful manner for the citizens of Toledo in the education of children. It receives money from the city, upon levy made by board of education. It is still a private school. This aid that is given by the city by way of taxation is simply, so to speak, feeding the uses and purposes of the trust and the board of education levies the tax because the trustees are carrying on a beneficial course of public instruction—one that is beneficial to the youths and children of the city.

It is shown by the provisions of these various sections of the Constitution to which I have referred, that a leading object and purpose of the Constitution is that the people of the state of Ohio shall be educated. It seemed proper to the members of the constitutional convention of this state that education should be promoted and that schools should be provided in order that the children might be educated. They are levying taxes in this city for the purpose of aiding this school—fitting it, if you please—and that is simply ancillary to the purposes of that trust. It is done, indeed, by the board of education. They are the ones who are authorized to do it. It is a part of the educational scheme; and although it is done, as it is said, by a special law, nevertheless it is rightfully done by a special law, because this body is not a corporation, and its objects and pur-

poses are not of a general nature, so far as this school is concerned. Nevertheless it has been of benefit to the children of this municipal corporation. It is done for the end and purpose that a certain amount of education may be acquired in useful branches; more than that, it is done in conjunction with the board of education, because this second deed that is made by Mr. Scott says that the intention and purpose of the donor, the founder of this school was, that it should be carried forward, not in opposition to the common schools or the school system of the state, but in conjunction with it, in extension of it, and for the purpose, as is stated, I think, in almost these words: That they may be educated in departments beyond that which they receive in the public schools of the city of Toledo. It is carried forward in conjunction with it, and hence it is that the proceeds of this fund may be used, and the work may be carried forward, in conjunction with those who have charge of the school system of the state. And it so carried forward. The Legislature has authorized the board of education to levy these taxes for the very purpose of carrying this forward in conjunction with, or in extension and in addition to, the education that is afforded by the public schools. And clearly, in our judgment, it is not contrary to Section 19, Article I, of the Bill of Rights.

I have in a very hasty and informal manner stated our views upon this question. It follows from what I have said that the demurrer must be sustained.

*W. H. A. Read*, for relator.

*M. R. Brailey* and *C. A. Friedman*, for defendant.

**EXEMPTION FROM ARREST.**

[Circuit Court of Cuyahoga County.]

**WILLIAM B. WHITE V. ARTHUR G. MARSHALL.**

Decided, March 20, 1902.

*Summons—Service of, in Civil Action—Exemption from, under Section 5457 a Privilege, which may be Waived—When Exemption should be Claimed—Service Voidable, but not Void—Acts Amounting to a Waiver.*

1. Service of process upon a privileged person is not void, but a mere irregular and voidable process; and unless the defendant by motion or plea in abatement raise the question of his privilege at the proper time, it will be regarded as waived.
2. Where service is made upon one privileged from process, it will be set aside because of the fraud upon the court and to shield its writ from imposition, and not because of any right possessed by the defendant to be relieved from such service.
3. This privilege like any other may be waived, and where the defendant enters an appearance by answer, or tenders issues of fact, it will be regarded as waived and is not thereafter available.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Arthur G. Marshall the defendant in error, was charged with having committed a crime in the state of Ohio, and the requisite papers were obtained from the governor of the state, and he was extradited from the state of Massachusetts and brought into the state of Ohio, and in the Court of Common Pleas of Cuyahoga County he was arraigned for trial. He gave bail for his appearance for trial in that court, and at about that time a suit was brought against him in the Court of Common Pleas of Cuyahoga County, Ohio, growing out of the same transaction, for which he was arrested and extradited. A summons was issued in the civil action and served upon the defendant in error, and thereafter the proceedings in the civil action, so far as they are material in this consideration, were as follows:

August 29, 1901, a petition and affidavit for attachment and præcipe was filed in this cause, and on the same day order of arrest issued; and, on August 30, 1901, the plaintiff filed his affidavit for civil arrest of the defendant in error, and his un-

dertaking and the order of arrest was issued. September 16, 1901, the defendant in error filed his answer, in which he joined issue with the averments in plaintiff's petition and said nothing of his exemption from suit. September 23, 1901, the order of arrest was returned "Not served on the defendant, A. G. Marshall." On the same day an *alias* order of arrest was issued, under which the sheriff took the defendant in error into custody on the day it was issued. While the first order of arrest was out for service the defendant in error, on September 18, 1901, filed in the case his motion for the court to fix the amount of bail, and his affidavit in support of the motion and after his arrest, the court heard this motion for bail and release, and overruled the same. September 25, 1901, the defendant in error filed his motion in the court for leave to deposit notes with the sheriff and to have the court discharge the attachment and fix the amount of bail. He filed therewith notice and affidavit. The motion in substance is:

"Now comes the said defendant, Arthur G. Marshall, and makes this his motion for the purpose of having his bond fixed for his personal release from the custody of the sheriff of this county; and for the purpose to discharge an attachment issued on the State Banking & Trust Company of Cleveland, Ohio, and for the further purpose of having the personal goods and chattels in the possession of said sheriff set over to this defendant in lieu of homestead exemptions;" and then he gives his reasons for his motion.

In his affidavit in support of his motion, among other things, he states that the notes in question, which were more fully described in the petition, are the property and assets of the defendant. That the plaintiff has garnisheed the State Banking & Trust Company of Cleveland, Ohio, and by reason of such garnishee process the notes in question are now in the hands practically, of the plaintiff, although the notes are still in the hands and under the control of the bank, and he is willing that the bank should turn the notes over to the sheriff of said county and have the notes held by said sheriff until the case is finally adjudicated and the rights of the respective parties fully and finally determined, and, unless some such arrangement can be

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made, he will be unable to give bail for his release in this case. And he avers that the plaintiff brings this action for the purpose of forcing this defendant to trade back the horses, buggies and other vehicles and said notes, which the affiant received from the said plaintiff for stock in said lead company, for the reason that this affiant, while in Cleveland during the summer of 1901, tried to sell to different banks and persons said notes, and which said plaintiff did not like. And affiant further states in his affidavit, that if the court will read plaintiff's petition, as well as the answer filed on the part of this defendant, and study into the merits of the matter, as will appear from the records so far filed in said case, together with any additional testimony which the defendant stands ready to furnish, that the court will come to the conclusion that a great wrong and a gross injustice is being done to said affiant on the part of said plaintiff, wholly and solely for mercenary purposes. And affiant further says that he has a just and meritorious defense to plaintiff's petition, as will appear from his answer filed in this case.

Then affiant states his arrest on the criminal charge, and that he believes that through the influence of the plaintiff and his attorneys, an excessive bond was required against him, which he was unable to procure and give, and he denies that he is guilty as charged in the criminal case, and denies that is guilty of wrong-doing or fraudulent transaction of any kind or character whatsoever in connection with said matter.

Up to this time the defendant nowhere in the proceedings in court had made any claim of exemption from suit or from arrest by reason of his being brought into the state under extradition papers. On September 30, 1901, the defendant filed this motion in the court, which is as follows:

“Now comes the defendant, Arthur G. Marshall, not intending in any manner to enter his appearance herein, but for the sole purpose of protesting and objecting to the jurisdiction of this court over this defendant, and moves the court to quash the summons issued herein, and to dismiss the action against this defendant for want of jurisdiction; and the defendant further moves the court to vacate the order of arrest on a writ of attachment before judgment in the above entitled cause, and

for reasons thereof says: That this defendant is, and at the time of his arrest under indictment No. 75581 and always before, was a non-resident of the state of Ohio; that he was brought within the civil jurisdiction of this court by extradition from a sister state; that this defendant was served with summons in a civil case entitled 'William B. White v. Arthur G. Marshall,' while so within the jurisdiction of this court without opportunity to return to the state from whence he was extradited. That this defendant was served with summons in a civil case (William B. White v. Arthur G. Marshall), while in the county jail of Cuyahoga county awaiting hearing on a criminal charge on extradition from the state of Massachusetts; that this defendant was arrested on a writ of attachment under Section 5491, Revised Statutes, while within the jurisdiction of this court, by virtue of extradition from the state of Massachusetts; that this defendant is illegally held a prisoner in the jail of Cuyahoga county, Cleveland, Ohio, on a civil process founded on Section 5492, Revised Statutes. That on September 24, 1901, this defendant entered into a bond for his appearance in court in answer to the criminal charge on which he was extradited and discharged from custody pending such hearing. That William B. White, plaintiff in the above entitled cause, is the prosecuting witness in the criminal case, under which this defendant was extradited from the state of Massachusetts, and the same William B. White from whom it is alleged defendant obtained property by false pretenses."

That motion was supported by the affidavit of Arthur G. Marshall. Had the defendant in error interposed this motion in the court before his appearance in the civil action and before his appearance to obtain his release on bail in the matter of arrest, it clearly should have been granted. This motion came on to be heard by the court on October 9, 1901. The court granted the motion, so far as to vacate the order of arrest on the order of attachment, and refused the motion to vacate the summons and discharge the defendant from arrest.

The plaintiff excepted to the ruling of the court vacating the order of arrest and discharging the defendant therefrom, and he prosecutes his petition in error in this court to reverse the ruling of the court below as to that point.

It has been determined in this state by the highest court that if a non-resident is charged with crime and brought within the

jurisdiction of the court by compulsory process, he is exempt from service of civil process while coming into the jurisdiction, while necessarily in attendance upon the court and while returning to his place of residence, provided no unnecessary delay occurs in returning (*Compton v. Wilder*, 40 Ohio St., 130). The authorities at the present time are quite uniform in holding upon this question, and many of the authorities state that the bringing of such an action is unlawful. They mean, however, nothing more by that than if the defendant objects to the jurisdiction of the court over him, he is entitled to have the summons in the case dismissed as to him, and if a *capias* has been issued and served, he is entitled to have the same set aside; and it is not intended to say that it is unlawful because it is prohibited by positive law, nor in that sense.

The exemption to civil service afforded by Section 5457, Revised Statutes, which provides who shall be privileged from arrest, is extended to the defendant who has been brought into the state by compulsory service as a privilege, and, like any other privilege, it may be waived. There are exceptions to this rule of waiver, but no court, so far as we know, has extended any of these exceptions to a case of this kind. Privileges of this nature are common in this country and in England, and they are extended to persons in various avocations, and especially to legislators, to persons attending court either as parties or witnesses, and to various other persons, and they are inseparably connected with the fundamental maxim in all free governments, and public exigency renders it necessary that private right shall yield to public good. The privileges are granted that the administration of the affairs of the government may not be interrupted or damaged by circumstances arising from the private affairs of those who are called into the public service. And hence it belongs to all who are assembled for legislative purposes, and, on like reasons, the courts must be protected and the importance of that branch of the government is regarded of equal importance to that of the legislative branch; and hence the exemption is extended to persons who are attending court as parties or witnesses; and, on like principle, the exemption has been extended to parties who have been extradited and

brought into the state by force. And while public policy is the foundation upon which the exemptions are granted, yet that public policy has never been construed for the benefit of the defendant to that extent that he may not waive.

Hence the courts hold quite uniformly that service of process upon a privileged person is not void, but a mere irregular and voidable process which may be waived by him, and, unless he makes a motion or a plea in abatement at the proper time to vacate the service and be released from the court, he is held to have waived the privilege. If prior to claiming his exemption, he does anything with reference to his appearance or defense, it is too late for him to thereafter make the claim. Such appearance is regarded by all courts as a waiver of his right of exemption.

In this case the defendant filed two motions for bail before he claims exemption, and in those motions he tendered an issue of fact which went to his rights not only as to bail, but as to a complete defense in the action.

There has been some controversy as to whether a mere entering of bail is sufficient to waive the exemption; and there are cases holding that where bail is entered by giving a bond to the marshal or officer holding the defendant in arrest without any appearance before the court is no waiver, but where the party appears to the court to have his bond fixed or enter bail in the manner in which the defendant sought to have it done in this case, he waives.

The cases all hold, so far as we have seen them, that it constitutes a waiver. And certainly if in his application to the court for bail, if he raises a question of fact to be tried by the court, such as that the plaintiff is trying to keep the bail large for the purpose of oppressing him; that he is incapable of giving a bond in twice the amount of the judgment asked, and that it is impossible for him to deposit \$12,000; that he is a man of limited means; that he is entitled to a considerable portion of the funds claimed by the plaintiff, by way of exemption; that the notes in controversy and which he desires to have held by the sheriff as security for his appearance are really his property; that the object of his arrest is to force him to surrender certain prop-



erty to the plaintiff; that a great wrong and injustice are being done him on the part of the plaintiff for mercenary purposes; that he has a defense to plaintiff's petition; these are all questions upon which an issue may be formed and upon which, or upon many of them, issue was taken which can only be determined by a trial to the court, and which determination of the court became necessary in fixing the amount of bail for the release of the defendant.

This to our minds clearly constitutes such an appearance in the arrest as will waive the exemption provided for defendant by the law of the land. *Smith v. Jones*, 76 Me., 138 (49 Am. Rep., 598); *Brown v. Gatchell*, 11 Mass., 14; *Cole v. McClellan*, 4 Hill, 59; *Farmer v. Robbins*, 47 How. Prac., 411; *Stewart v. Howard*, 15 Barb., 26; *Pixley v. Winchell*, 7 Cow., 366 (17 Am. Dec., 525); *Green v. Bonafon*, 2 Miles, 219; *Peters v. League*, 13 Md., 58 (71 Am. Dec., 622); *Thorton v. Writing Mach. Co.*, 9 S. E. Rep., 679 (83 Ga., 288); *Prentiss v. Commonwealth*, 5 Rand., 697; *Lyell v. Goodwin*, 4 McLean, 29.

This privilege of a person from the service of civil process can not be noticed by the courts *ex officio*. As it may be waived, it must be claimed, and it can be claimed only by a plea or motion made at the proper time. *Holiday v. Pitt*, 2 Strang., 985; *McPhers v. Nesmith*, 3 Grat., 241; *Geyer v. Irwin*, 4 Dall. (Pa.), 107; *Chase v. Fish*, 16 Me., 146; *Prentiss v. Commonwealth*, 5 Rand., 697 (16 Am. Dec., 782).

It is contended on behalf of the defendant in error that the court, where it finds there has been an abuse of process, will set aside the service even after appearance. This has been done where the parties have been decoyed into the state that service might be made upon them, or where they have been brought within the jurisdiction of the court by fraud and false pretenses, and in such cases the court, it has been held, will set aside the serving on the ground that the service is irregular—not because the plaintiff is entitled to have the same set aside if he has entered appearance, but because it is a fraud upon the court, and the court does it for its own protection and to shield its writ from imposition. *Williams v. Reed*, 29 N. J. Law, 385; *Nason v. Eston*, 2 R. I., 337; *Metcalf v. Clark*,

40 Barber, 45; *Wood v. Wood*, 78 Ky., 624; *Blair v. Turtle*, 1 McCreary, 372.

And such service has been held to be an abuse of judicial process. *Chubbuck v. Cleveland*, 35 N. W. Rep., 362 (37 Minn., 466); *Van Horn v. Manufacturing Co.*, 15 Pac. Rep., 562 (37 Kan., 523); *Townsend v. Smith*, 3 N. W. Rep., 439 (47 Wis., 623); *Duringer v. Moschino*, 93 Ind., 495.

The defendant in error seeks to avail himself of the rule established by these cases and from them argues that the court was justified in setting aside the order of arrest in this case. It will be seen by referring to the motion which the court granted so far as to quash the writ of arrest, that there has been no plea nor claim of any kind that the defendant was guilty of any fraud or false pretenses or deception of any kind in bringing Marshall from the state of Massachusetts to the state of Ohio to be criminally prosecuted.

It may be admitted that if extradition process should be used for the purpose of bringing the party into another state with the intention of there serving him in a civil action, that the court might under such state of facts relieve the party from his appearance, not because the defendant himself could claim the same if he had voluntarily entered his appearance in the action, but because of the imposition upon the court and upon the state that brought the prisoner within its borders to answer for a crime therein committed. The good faith required in such cases is that the defendant shall be prosecuted for a crime he has committed, and not brought into the state for mere personal motives and for the purpose of a civil action.

But, as we have said, there is no claim of such duplicity and unfair practice and evil intent set forth in the motion; and hence no evidence would have been competent upon that subject before the trial court. This being true, if we still say that the court may even without a motion and proofs showing such bad faith, quash the writ, we are then saying that the court may in all cases where civil process has been commenced, under like circumstances, quash the writ, even though the writ was not procured by means of duplicity and false pretenses. This is equivalent to holding that the court may *ex officio*, regardless of claim

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and proof quash the writ in all cases where civil suit has been commenced and a *capias* issued under the facts as they appear in this case.

All that appears in this case is, that the defendant was extradited from the state of Massachusetts, was brought to Cuyahoga county, Ohio, to answer for the commission of a crime; that he was being held under bail for trial in that proceeding.

There is nothing to show that this was not done in the utmost good faith except the fact that civil suit was commenced. Hence if the court can interfere in this case without any claim of fraud, without any proof of fraud, except the commencing of the civil action, then it may interfere in every case which would make the commencing of a civil action against a privileged person absolutely unlawful, as much so as if prohibited by direct law upon that subject, which is not the intention of the statutes and the constitution granting the exemption, and is contrary to the holding of all courts.

As we understand the law in regard to the cases last referred to, it is this: That if the defendant has waived the privilege and entered his appearance, yet if it appears to the court thereafter that the defendant has been brought into the court and the action has been commenced through the fraudulent use of the court's writ, and that appears by testimony and by a claim made in the case, the court will then interfere, not to protect the defendant, but to protect the court against fraud and unfair dealing by its officers.

It is the opinion of the court that the defendant entered his appearance by his answer to the petition in the civil action and by the motions he filed to quash the writ upon which he was arrested, and having appeared by way of tendering issues to obtain his release from the arrest, he can not thereafter avail himself of his privilege, but has waived it. And the court erred in quashing the writ upon which he was arrested, and releasing him.

For this error the judgment of the court below is reversed, and the case is remanded for further proceedings.

*Kline, Carr, Tolles & Goff*, for plaintiff in error.

*W. H. Boyd*, for defendant in error.

**REPRESENTATIONS TO MORTGAGEE AS TO THE VALUE OF  
PROPERTY.**

[Circuit Court of Lucas County.]

GEORGE H. McMULLEN, RECEIVER, v. BRITTON W. GRIGGS ET AL.

Decided, February 7, 1902.

*Mortgage—Representation by Mortgagor—As to Value and as to Title  
—Agency—Liens of Mechanics and Material Men—Interest Thereon.*

1. The rule applies to real as well as to personal property that a statement by the seller or mortgagor exaggerating the value of the property is not a fraudulent representation, or one that will avoid the contract, where the purchaser has full opportunity to examine the property and is competent to judge of its value.
2. A representation by a mortgagor that he is the sole owner of the property upon which he is contracting the loan, whereas in fact he is the legal owner with an equitable interest outstanding upon which the holder asserts no claim, is not such a false representation as to title as to relieve the mortgagee from advancing the full amount stipulated in the mortgage contract.
3. The representative of a mortgage loan company who has authority to solicit subscriptions to its capital stock, collect dues and fines, solicit loans and cause property to be appraised upon which loans are to be made, is an agent of the loan company, notwithstanding his compensation is derived from commissions paid by those borrowing money from the company.
4. In decreeing that a loan company shall advance the balance due under the mortgage contract for the payment of liens of mechanics and material men, interest will be allowed on the liens from the date of the completion of the mortgaged premises, less arrearages due to the loan company.

HULL, J.; PARKER, J., and HAYNES, J., concur.

Heard on appeal.

This action grew out of the building of a certain building in the city of Toledo, and the loan that was made to the owner of the building by The Southern Ohio Loan & Trust Company, as secured by mortgage, and the rights and claims of certain mechanics and material men who furnished material and performed labor in the construction of the building.

The question in the case presented to us is, whether The Southern Ohio Loan & Trust Company, called the loan com-

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pany for convenience, should be required to advance a balance of \$1,500 still remaining unpaid on the mortgage of \$4,500 which was given by Britton W. Griggs to the loan company to secure a loan for that amount. The claim of the loan company is that they were defrauded by Mr. Griggs at the time of the loan; that he misrepresented the value of the property, the title to the property, and, further, that the building was not completed according to contract; that they advanced \$3,000 and that that is all that they should be required to advance upon this mortgage by reason of these misrepresentations.

The claim of the mechanics and material men—for the controversy is between the loan company and the mechanics and material men—is, that under the equities of the case, the loan company should be required and are required to advance the full amount of the mortgage; and further, that after the building was partially completed, it being apparent that there was not sufficient on hand of the money advanced under this loan to finish the building and to pay for the work and labor, that the loan company agreed with the mechanics and material men, in consideration of their releasing their mechanics' liens, that the loan company would advance the balance of the mortgage, then about \$1,500—it was in fact \$1,700, but there is only \$1,500 in controversy—and that the balance of the mortgage should be distributed among the mechanics and material men; and the mechanics and material men claim that by reason of that contract, which they claim was made with the agent of the company, Mr. H. H. Barber, they proceeded with the construction of this building and finished it. Having finished it, the loan company refused to advance the balance of the money, and action was commenced by Mr. McMullen, as receiver for Hyter & Company, the holder of one of the liens, to foreclose the liens, and all the interested persons were made parties.

The general office of the loan company was in Cincinnati, and H. H. Barber was the agent of the company, at least for certain purposes, in the city of Toledo. He had admitted authority to solicit loans, and to collect assessments, fines, dues, examine property, appoint appraisers of property, and exercise some other authority. His appointment was in writing and makes

him the agent of the company. It reads:

"This is to certify that H. H. Barber, the bearer hereof, has this 26th day of June, 1899, been appointed local agent of The Southern Ohio Loan & Trust Company, for Toledo, Ohio, and is hereby duly empowered to solicit subscriptions to the capital stock and collect the membership fee therefor."

Signed by the president and M. S. Todd, secretary.

Britton W. Griggs was the owner, as has been said, of this property. He had negotiated a loan with Irish & Company for \$2,500. In fact, he purchased the lot through Irish & Company for a consideration of \$1,500 and executed a mortgage thereon for \$2,500. They loaned him \$1,000 above the purchase price with which he began the construction of this building.

This money being insufficient, in November, 1899, he called upon Mr. Barber, the agent of the loan company in Toledo, and finally made written application to the loan company for a loan of \$5,000. This application was rejected; or, at least, one was sent on in its place for \$4,500, which he filled out. In that application he represented that the cash value of the lot was \$1,600, and that with the improvements when they were completed, the value would be \$9,000, and signed answers to various other questions which were printed in the application. This was sent on, and his loan for \$4,500 was allowed, and a mortgage was executed pursuant thereto, and sent on to the company. As a part of this application, there was an appraisers' report which was made by appraisers appointed by Mr. Barber, and sworn by him as notary. The appraisers appraised the lot at \$900 instead of \$1,600, and the buildings and improvements, when completed, at \$5,000 instead of \$7,400, the amount named in the application, which preceded this appraisal, and was on the same piece of paper. All of this went to the company, the owner's estimate of the property and the estimate put on it by the appraisers. It is claimed that this was such a misrepresentation on the part of Mr. Griggs as would invalidate the mortgage contract or relieve the company at least from advancing the amount they had agreed to advance. It was further claimed that Griggs represented he was the owner of the

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property and sole owner; but that in fact Mr. Swinehart had an equity in the property and that that representation was therefore false, and that the company relied upon these representations in making the loan, and that therefore they are relieved from advancing the full amount of the mortgage, and it is claimed that the mechanics and material men who did work upon the building and furnished the material can have no greater rights than Griggs.

If the company had relied entirely upon the representations of Mr. Griggs, the case would stand differently from what it does. But it appears, instead of relying upon his statement, they required Mr. Barber to appoint three appraisers, who, in his judgment, would be competent to appraise this property; and that they did appraise it, and placed a value upon it considerably lower than the value fixed upon it by Mr. Griggs; that Barber himself examined the property at the time the company agreed to make this loan of \$4,500; they had before them the information afforded by this appraisal by appraisers that were appointed by their own agent in the city of Toledo. So it is very clear that they did not rely and did not intend to rely wholly upon the representations that were made by Mr. Griggs. If they did not rely upon them, but sought information elsewhere, they were not prejudiced by the value that he might put upon his property. And more than that, the testimony shows that before this loan was made, which was in February, Mr. Todd, the secretary and treasurer of the company, was in Toledo, and he also seems to have acted in the capacity of general manager of the company. He went out to this property and examined it himself, examined the lot; and the building at that time was well along toward completion, and he examined that; and after an examination by this officer of the company the loan was made. So that the company not only had the judgment of the appraisers, but also the benefit of an examination by one of its officers.

The law is well settled that in matters of value, which are always to a great extent matters of opinion, if the purchaser, as you may call the mortgagee here, examines the property himself and has full opportunity to examine it, and is competent

and capable of judging of its value, so that no advantage of him is taken, that a statement by the seller that the property is worth more than it really is is not a fraudulent representation, or such a representation as would avoid a contract. The rule is often applied to personal property, and there is no reason why it should not be applied to real estate in a case where the facts are such as to admit of its application.

Here was a transaction where each party had an opportunity to examine and had sufficient knowledge and experience to form an opinion of his own. So that, so far as these representations, if there were any, as to value, are concerned, we think that they were not of such a character, under all of the circumstances, as would amount to a fraud or would vitiate or affect this mortgage. It appears that Griggs did probably put a high estimate on this property. He paid \$1,500 for it however; but the agent through whom he bought it (there is some intimation at least of this) paid only \$800, and that was regarded by the agent and his principal, perhaps, as the real value of the property. But Griggs had no knowledge of this arrangement, and he paid \$1,500 for the property, and perhaps honestly thought it was worth about \$1,500. At any rate, we find, under all the circumstances, there was no representation here that would affect this mortgage.

As to the title, Griggs represented that he was the sole owner of it. It appears by the testimony that Swinehart, his partner, had an equity in it. They were partners in the building business. But Griggs did have the sole legal title to the property, and so far the record disclosed, he was the sole owner. Swinehart makes no claim of any interest in it. So that if these representations of Griggs were not exactly true, it worked no prejudice to the loan company.

The mortgage was sent on, and on February 6, 1900, the loan company, through Mr. Todd, forwarded \$3,000 to Mr. Barber, and with it a blank waiver of liens to be signed by all persons having liens upon the property. This waiver of liens apparently was filled out in the office of the company before being sent here. It is a printed blank filled out. And with the check for \$3,000 was sent a letter of instructions to Barber to have the



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enclosed waiver of liens signed by the persons having furnished labor or material. It was apparent that \$3,000 would not finish the building. The material men and mechanics concluded they were liable to lose at least a portion of what they had put in the building. They had various meetings and discussed matters and talked of discounting their claims, and finally, on February 17, they met Mr. Barber at his office, and all of them signed a waiver of liens that had been sent on by the company, in consideration of the company agreeing that the balance still coming upon the mortgage, \$1,724.50, would be advanced—the amount in dispute, as stated, really being only \$1,500, there being no controversy that the rest was advanced, bringing it up to \$3,000. And in the waiver which they signed they postponed their claims to that of the loan company, and their priority to the mortgage of the loan company. The waiver contained this language:

“In consideration of one dollar paid to each of them severally by The Southern Ohio Loan & Trust Company, the receipt whereof is hereby acknowledged, and in further consideration of a loan of \$4,500 granted by the said The Southern Ohio Loan & Trust Company to the said Barton W. Griggs, and secured by mortgage upon said premises, do hereby respectively postpone to the said The Southern Ohio Loan & Trust Company any priority which they may have or might otherwise obtain by mechanics' lien, or other similar liens upon said premises.”

The waiver itself contained a recital and statement that this was done in consideration of this loan of \$4,500, and the original agreement and arrangement between the loan company and Griggs was that this money was to be used in the construction of this building; and upon a written order signed by Mr. Griggs, it was all to be sent to Mr. Barber, who was to distribute it among the persons entitled to it; the loan company accepting this order, which is as follows:

“THE SOUTHERN OHIO LOAN & TRUST COMPANY:

“I hereby authorize you to pay the proceeds of my loan of \$4,500 made in accordance with my application, bearing date

the ---- day of ----, 189—, as stated below, and this shall be your receipt therefor.

“\$4,500 to H. H. Barber.

“(Signed) BRITTON W. GRIGGS.

“Witness: A. F. SWINEHART.”

So that the arrangement and understanding between Griggs and the loan company was that this money was to be used to complete this building, and that it was to be held by the company, or by its agent, and distributed by him to those who performed labor or furnished material for the building. It was not to go into Griggs' hands at all unless there was some surplus. And the \$1,500 being held back, in consideration of the company loaning the full amount of \$4,500, the lienholders, the mechanics and material men who were entitled to liens signed this waiver, and the company accepted it.

But besides that, Mr. Barber signed the following paper on the same day, and as a part of the same transaction:

“TOLEDO, OHIO, February 17, 1900.

“The Southern Ohio Loan & Trust Company, in consideration of the waiver of certain rights and priorities on the part of certain persons and firms who have performed labor and furnished materials for the erection of a building upon the following real estate, viz., the west twenty-four feet of lot 2 and the east twelve feet of lot 3 in Spaulding's addition to Toledo, Lucas county, Ohio, hereby undertakes and agrees that after the payment of claims and liens which have priority over the claims and liens of such persons and firms signing such waivers, it will retain in the hands of its agent the balance of the fund arising from its loan and mortgage upon said real estate to be paid out from time to time upon and for construction and completion of said building, insurance upon the same and at least one month's dues. Said company represents that said balance will be the sum of \$1,724.50, provided that the claims as presented and included in this settlement include all the claims that can become a lien upon said real estate.

“(Signed) H. H. BARBER,

“*Agent and Local Treasurer of The Southern Ohio Loan & Trust Co.*”

So that if Mr. Barber was authorized to act for the company in this matter, here was beyond question a contract between the

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company and the lien holders that could be enforced; that on the one hand, the company would advance the balance of \$4,500, and on the other hand, the lien holders would waive their liens, the money to be held by the company or its agent and paid to the lien holders according to their rights and claims. But it is claimed that Mr. Barber had no authority to make this contract, and therefore that it was not binding upon the company. He had theretofore been appointed the agent of the company. He had authority to solicit loans for the company, collect fines and dues, and appraise property, and to do everything necessary to make a loan for the advantage and purposes of the company. He received his compensation, or most of it, at least, in the way of commissions from those who borrowed money from the loan company, but so far as is disclosed here, he was not the representative of the borrower in any respect. It was not his duty to protect the borrower or his interest in any manner. He did nothing for the borrower except to take his application and send it to the company, and take the necessary steps to protect the company if a loan was to be made. At the time this contract was made, there had been no intimation on the part of the company that the full amount of \$4,500 would not be advanced. The amount spoken of in the waiver of liens which was sent on by the company to Mr. Barber to have the lien holders sign is \$4,500, and no question was made by them or by any one but that the full amount would be advanced. In sending on the \$3,000, in their letter, they say: "We enclose check for the sum of \$3,000 on account of loan 4364, Britton W. Griggs." It is *on account* of that loan. It was usual for them to withhold a portion of the amount until the building was finished. After these contracts had been signed, in the following April, Mr. Barber wrote the company quite a long letter, going somewhat into details as to the matter of the waiver of liens. The date of the letter is April 24, 1900. He says, among other things:

"As claims for labor and material were brought in, it became evident that your loan, even the whole \$4,500, would not be sufficient to pay the bills, and Hyter & Co. having the largest unsecured claim, and having confidence in the property, desired to see the property completed and the loan made as contem-

plated. They called a meeting of the creditors and obtained from all some concessions on their claims, and then took the title from Mr. Griggs and undertook to finish the building according to the plans and specifications. Mr. McMullen, who holds the legal title, is the manager of The Hyter Lumber Company. When everything was adjusted and first liens would be paid and waivers of liens obtained, I paid first liens and labor claims on the basis agreed upon among the creditors, and I have distributed all of the \$3,000 that you sent."

Then he says further along:

"Before sending my report I went to Mr. McMullen and presented the bill for arrearages. He said it was all right and would be paid, but remarked that the building was just about finished, and that, considering what they already had in the building, they would like to get their share of the \$1,500 before paying the bill for arrearages. I told him you were anxious to have the account paid, and he made the remark that you ought not to feel very bad about it, as you then had in your possession \$1,500, most of which, with the building so near completion, belongs to the Hyter Co."

On the same day Mr. McMullen wrote to the loan company, among other things:

"The building in question is only this day finished. Delayed by bad weather, etc. You have \$1,500 yet in your hands, and out of this amount Mr. Barber, your agent, advised me you would hold your first and probably second payment."

The company previous to that had written to Mr. McMullen to pay the dues on the loan as follows:

"We are advised that you are the owner of the property securing loan No. 4364, Britton W. Griggs, and beg to advise you that unless arrearages on this loan are paid by the 26th inst., suit in foreclosure of the mortgage will be filed."

That bears date of April 23, 1900, and in the letter by Mr. McMullen of April 24 he refers to the receipt of this letter.

After receiving McMullen's letter of April 24, the company, through Mr. Todd, under date of April 26, wrote McMullen:

"If you are the owner of property securing loan No. 4364, Britton W. Griggs, it would be proper for you to pay up arrearages on the loan, which for this month amounts to \$85.16.

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Another payment will be due May 5. The matter of closing the loan will receive due attention when arrearages have been paid on amounts already advanced."

This was the answer to his letter of April 24, in which he stated to the company there was \$1,500 coming, and they say "the matter of closing the loan will receive due attention when arrearages have been paid."

McMullen then sent on his check for \$85.16, and subsequently sent on a check for one month's dues, \$32.50, which latter was the full amount due on the loan of \$4,500. This was accepted by the company, and they requested him to pay all arrearages as they became due.

It appears from this correspondence that the company were fully advised of what had been done by Mr. Barber and of the arrangement that had been made as to the liens that had been waived, and of the agreement that had been made, and the understanding there was that the company would advance the balance of this amount, and we think that what Barber did was fully ratified in any event by the loan company.

But we are of the opinion that the arrangement that Mr. Barber made was within the scope of his agent and authority. He had power and authority to negotiate this loan, and to make collections, and power to protect the interests of the company in all proper matters pertaining to the loan. At the time this arrangement was made, there had been no suggestion on the part of the company that the full amount would not be advanced. And in making this arrangement he was simply protecting the interests of the company and making arrangements whereby this loan could be made, which was the company's business—their business being to make loans, and whereby their interests would be protected, and their mortgage claim put ahead of the claims of the mechanics and material men—and by virtue of this arrangement, and relying upon the action of the agent of this company, the mechanics and material men waived their liens, and it seems to us that it would be unjust and inequitable for the court to hold, under these circumstances, that the mortgage of the loan company should have priority over the claims of the mechanics and material men who finished this building.

We are of the opinion, as already stated, that the representations of Mr. Griggs as to the value of this property were not of such a character as to vitiate or affect the mortgage. But if they were, they would not affect the rights of the mechanics and the material men. If there were any fraudulent or false representations on the part of Griggs, in his application for the loan, they were not a party to them, had no hand in them and no knowledge of them, and therefore were not affected by them; but the loan company, after they had examined the property, and after a month or more had gone by from the time that the loan was agreed upon, and with full knowledge of all the material facts or with opportunity to secure full knowledge, through its agent, made this contract with the mechanics and material men, and by virtue of the agreement of the loan company, and by reason of its agreement that it would advance the balance of the money due upon this mortgage, they released their liens for their labor and their material. We are of the opinion that they would not be deprived of their rights under this contract made with the company even if Griggs' representations were false and fraudulent in law to the extent claimed by the company.

We have reached the same conclusion in this case that was reached by the judge who tried the case in the common pleas court. We think that the mechanics and material men are entitled to priority over the loan company to the extent of \$1,500, the balance due upon the mortgage, if that amount is necessary to satisfy their claims. The same decree should be entered here that was entered in the court below.

Mr. Brumback: "May I inquire if your honors considered the question of subrogation?"

Judge Hull: "Yes, we considered the question of subrogation; \$2,500 of this \$3,000 advanced having been used to pay off the Irish mortgage, the loan company would be entitled to be subrogated to that amount; but the \$1,500, which was the balance of the mortgage, and which the loan company agreed to advance, but did not, was a matter that came after and in addition to the paying off of the Irish mortgage. If the loan company had put into Mr. Barber's hands the \$1,500, which was agreed to be distributed among the mechanics and material men,

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then you would be entitled to be subrogated to the amount of the Irish mortgage and would be entitled to the first lien to the amount of \$3,000. The mechanics and material men have the first lien then to the amount of \$1,500, the balance due upon the mortgage. But the result is the same, whether it is figured out in that way, or whether the court decrees that the mechanics and material men have the first lien for \$1,500 as against the mortgage loan for \$3,000, which the loan company now holds. Carrying out the views of the court in your way simply requires the loan company to pay into Mr. Barber's hands \$1,500 to be distributed according to the agreement and arrangement which we hold was made."

Mr. Emery: "Will your honor dispose of the interest on this \$1,500 from the time the building was finished and it should have been paid?"

Judge Hull: We had not considered that, but the money, not having been paid when the building was finished, you are entitled to interest upon it from that time."

Mr. Brumback: "There should be some consideration paid to these dues and premiums which should have been kept up all the time."

Judge Hull: "Yes, up to the time the building was completed when the money was due, you can compute that and arrive at the difference. You should have credit for the dues and arrearages, which should have been paid up to that time."

*Ralph Emery and B. F. Brough, for plaintiff.*

*O. S. Brumback, for Southern Ohio Loan & Trust Company.*

*Fluckey & Garver, for Jacob Cook and Ruth A. Arnold, executrix.*

*T. L. Gifford, for Wolf & Warnke.*

**RIPARIAN OWNERSHIP.**

[Circuit Court of Lucas County.]

**ABRAM M. CHESBROUGH v. ANNIE M. HEAD.\***

Decided, February 14, 1902.

*Riparian Rights—Are Conveyed to Abutting Purchaser—Without Being Included in Boundary Lines—Meander Line Not a Boundary Line.*

1. Unless excluded by apt and proper words, riparian rights pass to a purchaser of land abutting upon a navigable stream, or of a platted lot so abutting, without measurement of the bed of the stream and without payment for the land so included, except as it is covered by the purchase price of the land on shore.
2. A meander line bordering upon a navigable stream does not make a boundary, but is run for the purpose of determining the quantity of the land.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on appeal.

This case was tried in this court on appeal from the common pleas court and is an action to quiet title; the plaintiff claiming to be the owner and in actual possession of "All that part of the bed of the Maumee river lying between the surveyed portion of lots thirteen (13), fourteen (14), fifteen (15), and sixteen (16), of Ironville, on the southeast and the center of the channel of the Maumee river on the northwest, and being a part of the Wasayon tract, in town nine (9) south, range eight (8) east, Michigan meridian in Lucas county, Ohio." As appears from this description, the land in question is a portion of the bed of the Maumee river, and the whole of it is usually covered by water and lies opposite the surveyed portions of the lots mentioned.

The question in the case is, whether the deed which conveyed to the plaintiff said lots 13, 14, 15 and 16 of Ironville, conveyed with it the right and title to the land under the water, subject to the public right of navigation, or whether the deed only conveyed the surveyed portions of those lots as described and in-

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\*Affirmed by the Supreme Court without report. October 20, 1903.



dicated by the lines on the plat of the village of Ironville, which plat was made and recorded by the proprietor, David Weaver, in January, 1870.

Weaver mortgaged these lots to Valentine Ketcham; they were sold on foreclosure and bid in by Mr. Ketcham, and he afterwards made a conveyance to plaintiff of those lots, describing them by numbers, according to the plat. This occurred during the lifetime of Weaver. Subsequent to this deed by Ketcham to Chesbrough, Weaver made a deed of the bed of the river, opposite these lots, to the defendant. After Weaver's death his heirs made a deed to the plaintiff of this property; but that was subsequent to this deed, so that, after all, it comes back to the question of whether by the deed from Ketcham to plaintiff of these lots, by number, the title to this land under the water, so far as it is susceptible of private ownership, was conveyed to the plaintiff; whether the whole riparian rights appurtenant to and incident to the land bounding and abutting upon the river at the foot of these lots was conveyed by that deed, or not.

A case involving a similar question, *Annie M. Head v. Abram Chesbrough*, the same parties, some years ago went to the Supreme Court from this county. The land in that case was that lying in front of the surveyed portions of lots 11 and 12, immediately adjoining the lots in question here. That case was decided in favor of Chesbrough in the circuit court and affirmed by the Supreme Court without report. The case below was fully reported and the decision of Judge Pugsley of the common pleas court is found in *Head v. Chesbrough*, 4 N. P., 73, and the decision of the circuit court in *Head v. Chesbrough*, 13 C. C., 354. It is claimed that the facts in this case are somewhat different from those in that case.

The principle of law that a conveyance of lots bounding and abutting upon a navigable stream carries with it the riparian rights and the title to the land under the water, unless there are express words in the conveyance excluding from the conveyance such rights, seems to be well established by all the authorities in this state. It is not my purpose in this opinion

to review these authorities at great length. They were fully discussed in the other case, in the briefs of counsel and in the opinion of Judge Pugsley. The case where this doctrine was first clearly announced in this state is that of *Gavit v. Chambers*, 3 Ohio, 495, 496, where the syllabus says:

“In Ohio, owners of lands situate on the banks of navigable streams running through the state, are also owners of the beds of the rivers to the middle of the stream, as at common law.”

This was a case that went up from Sandusky county and involved the rights of abutting owners in the land under the waters of Sandusky river. The court say, at page 498 of the opinion:

“We do not believe that it was the intention of the United States to reserve an interest in the bed, banks or water of the rivers in the state, other than the use for navigation to the public, which is distinctly in the nature of an easement, and all grants of land upon such waters we hold to have been made subject to the rule of the common law, which, in this case, is the plain rule of common sense. And it is this: He who owns the lands upon both banks owns the entire river, subject only to the easement of navigation, and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement. This is the rule recognized not only in England, but in our sister states.”

This case has never been overruled or criticized, but has been cited with approval by the Supreme Court in two or three subsequent decisions.

*Day v. Railroad Co.*, 44 Ohio St., 406, is in point and cites with approval the case of *Gavit v. Chambers*, *supra*. The first paragraph of the syllabus is:

“A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the center of the stream bounding the property. And to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion.”

On pages 419 and 420 of the opinion several of the Ohio cases are considered and quoted from, and among them *Gavit v.*

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*Chambers, supra*, and quoting from *Lamb v. Rickets*, 11 Ohio, 311, as follows:

“Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation.”

In the comparatively recent case of *Railroad Co. v. Platt*, 53 Ohio St., 254, this question was considered by the Supreme Court. The facts in that case were somewhat different from the case here, that being an action in ejectment. The law, as laid down by the syllabus of the case, is this:

“A conveyance of lands situated upon a navigable stream, the description being by courses and distances from a fixed monument and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the central thread of the stream.”

And on page 266 of the opinion, the court, through Judge Shauck, say:

“These considerations would seem to justify the presumption that a grant of this character is to the central thread of the stream unless apt terms are employed to limit it.”

And such appears to be the settled view of the courts of the country.

“To the application of this doctrine it is quite immaterial whether the stream be named as a boundary of the lands granted or there be a description by courses and distances from a fixed monument whereby a line is established coincident with the stream. The doctrine regards the substance of the grant and not its form.”

Counsel for defendant cites as an authority in this case and rely upon *Lembeck v. Nye*, 47 Ohio St., 336. In our judgment, however, this case is not applicable to the case at bar. The water in question in that case was the water of a small non-navigable lake in Medina county, and the rule as to such waters is different from that in the case of a navigable stream like the Maumee river. The first paragraph of the syllabus in that case is as follows:

“A non-navigable inland lake is the subject of private ownership; and where it is so owned, neither the public, nor an owner of adjacent lands, whose title extends only to the margin thereof, have a right to boat upon or take fish from its waters.”

Judge Bradbury delivered the opinion, and discusses the difficulty of applying the rule relating to navigable streams to such a body of water as a small inland lake.

Judge Shauck, in *Railroad Co. v. Platt*, 53 Ohio St., 254, at page 268 of the opinion, refers to the case of *Lembeck v. Nye*, *supra*, as follows:

“The views expressed in *Lembeck v. Nye*, 47 Ohio St., 336, were not intended to have, and can not have, any application to a case of this character. The lands there in controversy lay under water that was not navigable. By the clear terms of the syllabus the case was limited to lands thus situated; and in the principal opinion prominence is given to the consideration that the lake there in controversy was susceptible of private ownership, and the views here expressed were recognized as controlling in cases of navigable streams.”

So that it appears both from the syllabus of *Lembeck v. Nye*, *supra*, and from the expression of Judge Shauck in *Railroad Co. v. Platt*, *supra*, that the law as laid down in *Lembeck v. Nye*, *supra*, was limited and intended to be limited to lands bounding upon non-navigable inland lakes.

The plat in this case shows a line not exactly coincident with the water line of the river as shown upon the plat, the surveyor running the line near the water line, according to the evidence from three to five feet from the water line at the time the survey was made, this line running from corner to corner of the lots practically, but not exactly, the line angling with the curves of the river and not following the sinuous line of the water itself, or the “sinuosities of the river,” as some authorities express it, but turning at angles to correspond as near as possible to the curves of the river and so as to leave a strip of from three to five feet between the line and the water line of the river. The lots were sold by numbers according to the plat, and it is argued by defendant that no more land would be conveyed than that contained within the line of the lots as shown by the plat and

that the title conveyed, therefore, would stop with the lines run by the surveyor a short distance from the water line.

We find, however, from the evidence, that this line shown upon the plat near the water line was not intended as a boundary line of the lots, but what is known as a meandering line run by the surveyor, as near as practicable or convenient coincident with the water line, and that it is not to be regarded as the bounding line of the lots; that the lots were intended to be and in fact do bound and abut upon the Maumee river.

As to the effect of this meandering line, *June v. Purcell*, 36 Ohio St., 396, is in point, where the court say, on page 407:

"That the meander lines run in surveying portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but as a means of ascertaining the quantity of land to be paid for by the purchaser, was decided in *Railroad Co. v. Schurmier*, *supra*. The meander line, therefore, in the present instance, not being a boundary line, the only boundary line was the river; and the question is, when the boundary line of a riparian owner is thus described, where is it to be located? *Gavit v. Chambers* answers at the middle of the stream, as at common law."

This case is also a Sandusky county case, and the river was the Sandusky river. The case cited there is a decision of the Supreme Court of the United States found in *Railroad Co. v. Schurmier*, 74 U. S., 272; the court say, in the first paragraph of the syllabus:

"The meander lines run in surveying fractional portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, and which is to be paid for by the purchaser."

The amount of land in each one of these lots was ascertained by the surveyor, and that is indicated and marked upon the plat, and the meandering line, in our judgment, was intended to mark what was to be included in the measurement of the lot. The land under the water of a navigable stream is not included in the measurement of the abutting lot, but title to it passes to the center of the stream with the conveyance of the lot, and it is

not necessary to include it in the measurement. Unless excluded by apt and proper words, the riparian rights will pass without any measurement of the bed of the stream and without any payment for it by the acre or otherwise, except as it is included in the price paid for the land on the shore.

It appears from this plat, and it is one of the agreed facts in the case, that by the making of it and the recording of it, a street, called Lee street, was dedicated, and, according to the plat, the side lines of the street run down to the river between lot No. 12 and lot No. 13 of this tract of land, and this inner line of the surveyor runs across the street as well as across the lots, and the strip of land left there is as wide, apparently, as that across any one of the lots.

We think it very clear that Mr. Weaver did not intend to stop this street by the line inside of the water line of the river; it clearly was his intention to run this street to the river, and the surveyor did not intend, by running this line across the street, to reserve in Weaver a strip of land three or four feet in width across the street and separate it from the water of the river; the same line is run across the government lighthouse reservation in lots 200 and 201; where there is no such line, the acreage of the lots is not given upon this plat.

We therefore hold that it was the intention of Mr. Weaver to bound and abut these lots upon the river, and that they do in fact bound and abut upon the river and are to be so regarded, and the rights of these parties are to be determined according to that, and that being our holding, the rights of the parties are clearly and fully established by the law of the land. The deed from Mr. Ketcham to the plaintiff conveyed the whole of these lots, which we hold abutted upon the river, and there being in the deed no exclusion, no reservation of riparian rights, they were carried by that conveyance to the plaintiff.

This rule applies where the lots are conveyed by number as well as where they are conveyed by metes and bounds. This is so held in *Watson v. Peters*, 26 Mich., 508. The opinion in the case is by Judge Cooley, and the court say in the syllabus:

“The grant of a city lot bounded on a navigable stream, with the water as a boundary, in the absence of any express reserva-

tion, conveys to the grantee the land under the water to the center of the stream; and the fact that the grantor before conveying, platted the lands into lots and blocks, with distinct lines and distances marking the boundaries of each lot, and with the water boundary of the river lots indicated by a line representing the shore line, and conveyed by such plat, will not limit the grant to such shore line, or operate to reserve to him proprietary rights in front of the lots conveyed.

“The privileges and conveniences which appertain to the shore of navigable streams constitute a part, and often the principal part, of the value of the grant, and this is especially true of city lots, and therefore the reason of the rule which infers the intent to convey the land under the water is, in the case of such lots, most apparent and forcible.”

We are unable to see any appreciable or material difference between the facts of this case and those of the former case of *Head v. Chesbrough, supra*, which went to the Supreme Court. There is this difference pointed out, as shown by the finding of facts in the other case: Upon the three adjoining lots in that case docks had been built and extended out into the river, and the court also found in that case that the purchase price was so great that it would be presumed that the purchaser supposed he was acquiring with the main land the riparian rights and the right to the land under the water of the river. The briefs of counsel, however, which were filed in the Supreme Court, did not discuss this, but the case was presented to the court upon the general principles of law affecting and controlling the rights of the owners of lands bounding and abutting upon a navigable stream, and authorities along that line were cited by counsel at considerable length upon both sides, and the case was affirmed without report.

These two considerations referred to are mentioned in the opinion delivered by Judge King in the circuit court in *Head v. Chesbrough, supra*, but the syllabus of the case bases the decision upon the general principles of law, and is as follows:

“Conveyance of platted lots which are situated upon the banks of a navigable stream, no part of the bed of the stream being platted, includes all the riparian rights of the grantor in front of said lots to the center of the stream, although such stream is

not mentioned in the conveyance. To exclude such rights they should be reserved or excepted in the deed."

And on page 357, Judge King, in rendering the opinion, says:

"We think the law is well settled that when one party conveys land adjoining a navigable river of the state of Ohio, and the land in fact abounds and abuts upon the water which flows in front of the premises, and conveys by a conveyance which does not except or reserve the land in front of the premises, although they may be marked with boundary lines, that the grantee takes to the center of the navigable stream—to the center of the current."

The two lots involved in that case are shown upon the same plat and adjoin the lots in question here, and the line run by the surveyor at the end of the lot toward the river, or the end abutting upon the river, appears in front of the two lots in the former case as well as in this case, and we think the questions in that case, as decided by the common pleas and circuit courts and by the Supreme Court, are substantially the same as those involved here.

The decision of Judge Pugsley of the common pleas court in the former case is found in *Head v. Chesbrough*, 4 N. P., 73, and contains a full discussion of the rights of riparian owners, citing authorities at length and considering them, and the question is discussed by the judge along general lines and the general principles controlling the rights of the owners of riparian lands are stated, and there is no discussion of and no attention is paid to these two points—the price which was given for the land and the fact that there was a dock upon the adjoining lots projecting into the river. The syllabus of that case states the law as we understand and hold it to be:

"A conveyance of platted lots which are situated upon the bank of a navigable stream, no part of the bed of the stream being platted, includes all the riparian rights of the grantor in front of said lots to the center of the stream, although such stream is not mentioned in the conveyance. To exclude such rights they should be reserved or excepted in the deed."

Judge King, in delivering the opinion in the circuit court, did not undertake to review the authorities, but they are fully



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reviewed in Judge Pugsley's opinion and the decision covers the ground and we cite it as an authority in this case.

The decree, therefore, will be for the plaintiff, quieting his title to this property.

*C. W. Everett*, for plaintiff.

*King & Tracey*, for defendant.

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### NEGLECT IN CROSSING A RAILWAY.

[Circuit Court of Cuyahoga County.]

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. KATHERINE  
LANDPHAIR, ADMINISTRATRIX.

Decided, February 10, 1902.

*Negligence—Failure to Take Precautions at Railway Crossing—Will  
Defeat Recovery—Notwithstanding Negligent Running of the  
Train.*

There is no liability on the part of a railway company for the death of one who attempted in broad daylight, without looking for the approach of a train, to cross its tracks at a point where a train could be seen a mile distant, there being nothing to show the accident could have been avoided by the trainmen after discovering the peril of the decedent. The fact that the train was running at an unlawful rate of speed, or that there was a failure to give a warning signal by whistle or bell is without avail in such a case.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The plaintiff in error owns a railroad which passes through the city of Cleveland in Cuyahoga county, running east and west. Near the west line of the city and within the city limits, there is a place of resort called Edgewater Park. The tracks of the railway company run along the south side of this park. In this immediate vicinity there are public streets beginning on the south side of the right of way of said railway company and extending to the south. One of these streets is known as Ramsey street.

It is claimed on the part of the defendant in error, that immediately north of the north end of Ramsey street a crossing of planks, lying between the rails, was laid, and was in existence on June 27, 1899, extending from the north end of Ramsey street to the north line of the right of way of the railway company, the same being the south line of said Edgewater Park. That this crossing was a general passageway used extensively by the public, to the knowledge and with the consent of the railway company, for going to and from said park; that on the date last named the said Peter Daugherty, while somewhere on the right of way of the railway company at or near this crossing, was struck by an engine of the railway company, drawing a passenger train to the east, at about five o'clock in the afternoon, and was instantly killed.

The defendant in error, having been appointed administrator of the estate of said Daugherty, brought suit against the railroad company, charging that the death of her decedent was caused by the wrongful act of the plaintiff in error. The cause was tried in the court of common pleas, resulting in a verdict for \$500 in favor of the administrator; judgment was entered upon this verdict; a motion for a new trial was filed and overruled, and the present proceeding is prosecuted to reverse said judgment. A bill of exceptions is filed, containing all the evidence introduced upon the trial.

The negligence complained of in the petition of the plaintiff below, is that the train, at the time of this accident, was running at a much higher rate of speed than is allowed under an ordinance of the city of Cleveland; that no warning, either by the ringing of a bell, or the sounding of a whistle, was given as the train approached this crossing; that the train was not stopped, or its speed slackened, after said Daugherty was in a place of danger; and that no flagman was at this crossing for the purpose of warning people of on-coming trains.

The railway company admits that Daugherty was killed by reason of being struck by its engine; but denies that it was guilty of any negligence in the premises, and avers that the deceased was himself negligent at the time of the accident; and

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that but for his negligence he would not have been struck by the engine.

It is plainly shown by the evidence that the train at the time of the accident was running at a rate of speed much greater, several times greater, than was allowed by the city ordinance.

The jury might well have believed, from the evidence, that the crossing at the north end of Ramsey street was so generally used by the public as that the railway company should be held to have recognized it as a licensed crossing. There was no one employed by the railway company at this crossing to warn people of on-coming trains.

We are not prepared to say that the finding by the jury that the whistle was not sounded or the bell not rung in time to have been of any avail to one making use of this crossing, though it is extremely doubtful whether, under the evidence, such is a fact, would have been erroneous. We do not undertake to say that a finding by the jury that Daugherty was killed at this crossing would have been erroneous, though *that* is far from being made clear by the evidence.

If he was struck at this crossing, he was thrown or carried a long distance from it, because his dead body, when the train had passed it, was near the foot of Barrett street, which is about four hundred feet east of Ramsey street.

There is no evidence that would justify a finding that, after Daugherty was in a place of danger such as would indicate that he was likely to be struck by the engine, anything could have been done by the engineer to have saved him.

The evidence is clear, that at the time of the accident it was broad daylight; that there is an unobstructed view of the track for a mile to the west of where this accident happened; and that, if Daugherty had exercised *any* of that vigilance which is required of one to protect himself when in, or about to go in, a place of danger, he *must* have seen this on-coming train; there was nothing to prevent him from stepping upon either side of the track.

If then, every contention of the defendant in error as to the negligence of the plaintiff in error is found to be true, still the judgment of the court of common pleas must be reversed.

To hold otherwise, would be to say that one is not required, when in or about to enter into a place of danger, to exercise that care which our Supreme Court has again and again said he is required to exercise. See *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66; *Cleveland, C., C. & I. Ry. Co. v. Elliott*, 28 Ohio St., 340, 341; *Railroad Co. v. Depew*, 40 Ohio St., 121.

The judgment of the court of common pleas is reversed, for the evidence clearly shows negligence on the part of the deceased which either caused or directly contributed to the accident.

*Brewer, Cook & McGowan*, for plaintiff in error.

*Hart, Canfield & Callahan*, for defendant in error.

#### FEES—BANKRUPTCY.

[Circuit Court of Cuyahoga County.]

JOHN RODGERS & SON v. GEORGE FORBES AND JACOB SCHOEN,  
RECEIVER.

Decided, February 10, 1902.

*Compensation and Costs—Allowance of, May be Made—Where by Proceedings in Aid of Execution—Possession is Obtained of Assets of a Judgment Debtor—Who Thereafter Goes into Bankruptcy.*

1. The claim of a trustee in bankruptcy is superior to that of a judgment creditor of the bankrupt, who brought into court a fund by proceedings in aid of execution against the bankrupt within four months of his going into bankruptcy.
2. But the receiver of this fund is entitled to reasonable compensation for his services and expenses in bringing the fund into court, and an order for the payment thereof will be made by the state court before directing that the fund be turned over to the trustee in bankruptcy.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on appeal.

Rodgers & Son had a judgment against George Forbes. Failing to obtain satisfaction of such judgment by execution, they commenced a proceeding on May 6, 1901, before one of the judges of the court of common pleas of this county by filing the proper

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affidavit with such judge, under Section 5475, Revised Statutes, and the judge thereupon appointed Jacob H. Schoen, referee, as authorized by Section 5477, Revised Statutes.

The referee, upon the examination of a debtor of the judgment debtor, found and reported to the court that there was in the hands of such debtor of the judgment debtor the sum of \$431.45 belonging to such judgment debtor, George Forbes.

Thereupon, on May 9, 1901, the said Jacob H. Schoen was appointed by such judge of the court of common pleas a receiver to take possession of the sum so found due of the said George Forbes, and this the receiver did.

On May 15, 1901, the said George Forbes filed his petition in bankruptcy in the District Court of the United States for the Northern District of Ohio, and on May 16, 1901, he was duly adjudged a bankrupt by said court; and on May 27, 1901, H. L. Snyder was duly elected trustee in bankruptcy of the estate of the said George Forbes, and on May 30, 1901, he duly qualified as such trustee.

On June 11, 1901, the said receiver made his report to the court of common pleas of this county, showing the receipt by him of said \$431.54, and claiming to be allowed for his services and expenses the sum of \$175.

The trustee in bankruptcy filed exceptions to the report of the receiver, and makes the claim that the entire amount which came to the receiver's hands shall be paid to him. An order having been made in the court of common pleas, an appeal is taken to this court, and we are now called upon to say what the receiver shall do with this money.

On the part of the plaintiff it is urged that it should be applied, first, to the payment of the costs and expenses in connection with the proceedings in aid of execution, and, next, toward the payment of the plaintiff's claim.

On the part of the defendant it is said that it is clear that no part of it can be applied to the payment of the plaintiff's claim, and in support of this we are cited to Section 67f of the bankrupt act of 1898. This sub-section reads:

"That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is in-

solvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

It seems clear from the language of the statute that the plaintiffs can not hold this fund, or have any part of it applied upon the payment of their claim by reason of any lien created by the proceedings in aid of execution if any such lien ever was created. But, on the part of the plaintiffs, it is said that no lien ever was created in favor of the plaintiffs, but that without any such lien, the plaintiffs should be entitled to have paid the whole or some part of this by reason of their diligence in discovering this fund.

It would surely seem an anomaly to hold that if these plaintiffs had a lien by virtue of the proceedings in aid of execution they could not have any part of this money paid to them by the receiver; and yet to hold that having *no* lien they may have it so paid. Surely the rights of one *with* a lien upon the fund are not *inferior* to those of one having *no* lien upon it. And we hold that no part of the fund is to be paid to the plaintiffs.

We come, then, to consider the question of whether the receiver may retain out of the fund his proper compensation and expenses. He was acting as the officer of the court in his capacity as referee and also in his capacity as receiver. The funds are now in his hands as such officer of the court. The trustee in bankruptcy can take this money from him only by an order of this court.

It would seem the proper province of this court to pay its officer for his services and expenses, and we find authority for holding that it should so pay in *Lesser Brothers*, 5 Am. Bank Rep., 320. In the decision by the circuit court of appeals of the

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second circuit, the opinion being delivered by Judge Shipman, the last clause of the syllabus reads:

“Where certain creditors have by much diligence and litigation obtained a fund for the benefit of all the other creditors, and they are stayed from proceeding to enforce their judgment against such fund, it is proper to permit them to become parties in the proceedings by the trustee in bankruptcy instituted in the state court to obtain the money in the hands of the receivers belonging to the bankrupt’s estate, and for such creditors to make an application for an allowance to them from said fund as a reasonable compensation for their costs, expenses and disbursements in the litigation in the state court, and obtain such allowance, if in the opinion of the state court it is proper and within its power to grant.”

In this case, one Metcalf, a creditor of the bankrupt, had brought an action in the nature of a creditor’s bill against Lesser Brothers, who afterward were adjudged bankrupts. By this proceeding a large amount of property belonging to the bankrupts was found to have been transferred by them to others in fraud of the rights of their creditors; and this property was taken possession of by a receiver appointed in the state court. By the adjudication in bankruptcy, it was held that Metcalf was not entitled to receive anything in payment of his claim out of these assets, but was remitted to the proof of his claim in bankruptcy as a creditor like the other creditors.

On page 325, the court, in its opinion, uses this language:

“Inasmuch as the fund was in the custody of the state court and had been in such custody prior to the institution of the proceedings in bankruptcy, it was proper to make no order in regard to the action of that court, but to direct the trustee in bankruptcy to apply to it for its order upon the receiver to make payment to him.”

Here, in the present case, the trustee is here asking for such order of this court.

The court, in the case last quoted from, then holds that the trustee in bankruptcy, coming into the state court, should “present to that court such considerations and facts as may bear upon an application for an allowance to them (the plaintiffs) from the fund, in the nature of a reasonable compensation for

their costs, expenses and disbursements in the litigation which resulted in the defeating of the fraudulent attempts of the bankrupts in wresting the funds from the hands of the receivers applied for in fraud of creditors and in its preservation for their actual benefit.”

And the court further says, on page 326:

“The said appellants (Metcalf Bros. & Co.) are allowed to appear in said court, make an application for an allowance to them from said fund, at a reasonable compensation for their costs, expenses and disbursements in the litigation in the state court, and obtain such allowance if in the opinion of the state court it is proper and within its power to grant.”

No question is made here that the claim made by the receiver of an allowance of \$175 is unreasonable, and the order of the court will be that such receiver out of the funds in his hands, pay—

First. The costs of this proceeding.

Second. That after retaining for expenses of himself and attorneys the sum of \$175, he pay the balance of said sum of \$431.54 to the trustee in bankruptcy, H. L. Snyder.

*W. E. Slabaugh*, for plaintiffs.

#### NEGLIGENCE IN LEAVING AN UNPROTECTED EXCAVATION IN THE STREET.

[Circuit Court of Lucas County.]

CITY OF TOLEDO V. MICHAEL NITZ.\*

Decided, February 1, 1902.

*Negligence—On the Part of a Municipality—In Ordering Public Scales Removed and Leaving the Excavation Unprotected—Injury to One Who Fell therein—Verdict Exceeding Earning Capacity Sustained—Charge of the Court—Meaning of the Words “His Own Testimony.”*

1. Where the platform of a set of wagon scales, situated in the middle of a market space, is used by vehicles and pedestrians as a part

\*Settled and dismissed in the Supreme Court. For a prior holding in same case, see 22 C. C., 454.



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- of the street with knowledge of the city for many years, such platform will be regarded as a part of the street, and those passing over it are entitled to the protection due to one using any public street.
2. An order by the city for the removal of the scales platform is notice to the city of the unprotected excavation thereby created in the street, and liability arises in favor of a pedestrian who is injured by falling into the excavation while attempting to walk over the platform at night without notice of its removal.
  3. A verdict assessing damages for such an injury in excess of the earning power of the plaintiff, figured from his expectancy of life, is not excessive where it appears that his health was wrecked by the injury, and he was incapacitated from ever again following his usual vocation, and suffers pain and inconvenience continually.
  4. It is not error in the charge to the jury to read in such a case from the statute which prescribes that a municipal corporation shall keep its streets open, in repair and free from nuisance; nor to say to the jury with reference to the protection of the public from injury while using the streets that "what does not protect is not sufficient;" nor to say to the jury that they can not assume the city was negligent, or that the plaintiff was negligent—"the same rule applies to both \* \* \* but the burden is on the one who brings the suit; not to charge that contributory negligence to defeat recovery must be negligence which constitutes a proximate cause of the injury complained of.
  5. The expression "his own testimony" means, when used with reference to the plaintiff in the charge to the jury, all testimony offered on behalf of the plaintiff, and not merely the testimony given by the plaintiff himself.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

This case was before this court at a former term, Nitz then being the plaintiff in error. The case is reported in 22 C. C., 454. As the facts were quite fully stated in that opinion, it will not be necessary to go into them very fully now. The case was reversed at that time, chiefly on the ground of error in the charge of the court, the judgment below having been in favor of the city. The case was afterwards tried in the court of common pleas, and a verdict returned in favor of Nitz and judgment entered upon that verdict. It is to reverse this judgment that the city of Toledo filed a petition in error in this court.

Nitz brought his action to recover for personal injuries, caused, as he claimed, by the negligence of the city of Toledo, and re-

covered a verdict for \$6,350. A judgment was entered in his favor for that amount. The plaintiff's injury was sustained at what is known as the "Market Space," in Superior street, in the city of Toledo, lying between Monroe and Washington streets. There is here a platform some twenty-two feet wide, in the middle of the street, and which runs from Monroe to Washington street, except a space in the middle about fifteen feet wide, where there was a wagon scale that was used for market purposes. The platform, which was used for market purposes, was entirely open at the sides and at the ends, so that people might walk on it at any time, either day or night, if they saw fit. The privilege of the use of the scales was let by the city to private individuals. On the day of Nitz' injury the scales had been taken out by order of the city, a new lease having been made to another party than the one who had been renting and conducting the scales theretofore. This left an excavation from four to five feet deep; that is, from four to five feet below the level of the street, and from seven to eight feet below the level of the market space platform. Early in the evening Nitz was walking along, either on Superior street proper, west of the market space platform, as he claims, or upon the platform itself, as some of the witnesses testified he was doing, and having no knowledge that the scales had been removed, as he claims, he fell into this excavation, and three of his ribs were broken, according to the testimony of a physician who attended him, and others, including his own testimony. In consequence of his injuries he was confined to his house for many months. The testimony of his own physician shows that his injury produced pneumonia, which lasted for several weeks, and perhaps some months, and that he has since that time been unable to perform manual labor, in fact, not able to leave his house but very little of the time.

The claims of the plaintiff in error are that the verdict is against the weight of the evidence, and that the court erred in its charge to the jury.

When the case was here before, we held that the fact that the city itself ordered these scales to be moved, and that such removal of the scales caused the excavation, was in fact an order by the city for the excavation to be made; and that it was not

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necessary to show any further notice to the city or its authorities; that the city having ordered the excavation to be made, that would be notice and knowledge. And we held then, as we do now, that no guards had been placed about this excavation by the city, either by way of rails or lights. There is some testimony tending to show that there was some earth on the west side of the opening; some rubbish, perhaps, that had been thrown out when the scales were removed. The testimony of the plaintiff is that there was very little of this, not enough to attract attention. Whatever was there, it was because it happened to have been thrown out of this excavation, but was not put there by the city for the purpose of notifying any one that the scales had been removed or that there was an excavation into which one might fall.

Nitz claims that he was walking along Superior street, just west of the market platform, and that when he came to the opening in the platform where the scales had been, he walked across Superior street at that point, with the intention of walking through on the scales to the other side of Superior street, and then going east through an alley to St. Clair street. The evidence shows that there was a sidewalk extending from the west side of Superior street up to the scale opening, and that on the east side of the platform was a building occupied as a city prison and police court, and alongside that was the alley; and the evidence shows that the scales located in this place were and had been used for a very long period of time as a street, people passing back and forth, both on foot and in vehicles day and night. We think the jury were warranted in finding that the scales and platform were to be regarded as a street, and that one using them was entitled to that protection which the law gives him in using a street of a municipal corporation.

Upon this trial of the case no evidence was offered to show that the market platform itself, extending from Monroe to Washington streets, was used as a part of the street by people generally in traveling back and forth. That brings us to the first claim of counsel for plaintiff in error, to-wit, that the weight of the evidence is that Nitz was walking on the platform and fell off that into the scale excavation, and was not walking on the

street, as he claims; and it is claimed that if he was walking on the platform, there being no evidence that that was or had been used as a street, and fell from that into this excavation, that he could not recover. There was nothing said to the jury in the charge of the court upon this question. No special attention seems to have been given to it by counsel on either side at the trial, and no request was made along that line.

It is claimed that Nitz is within the rule laid down by the Supreme Court in certain cases, that a traveler can not recover against a municipal corporation where he is out of the limits of the highway, and has gone onto other property of the city for purposes of his own and is thus injured, as in *Kelley v. Columbus*, 41 Ohio St., 263, where a person was walking along the street, and left the highway and went onto a vacant piece of property near the city hall for purposes of his own, and was injured by reason of the condition of this lot upon which he walked. The Supreme Court held that he could not complain.

Along this line is also *Dayton v. Taylor*, 62 Ohio St., 11, where a person walked across the street inside the curb in a diagonal direction, and slipped into a catch basin, and it was held that in leaving the sidewalk he assumed the risks which lay in the path which he thus chose. In *Kelly v. Columbus*, *supra*, the traveler went outside the street entirely, upon a piece of ground that was not used for street purposes; in *Dayton v. Taylor*, *supra*, the traveler walked across the street in a manner not contemplated and was injured.

It is claimed that Nitz is within the principle of these two cases, and that, if he was walking upon the market platform, there being no evidence that that was used as a street, and fell from that into the excavation, he can not recover.

Some three or four witnesses, perhaps, testified that he was walking on the platform. Nitz himself claimed that he was walking on the street, where he fell into the excavation.

In our judgment this case may be distinguished from *Kelley v. Columbus*, and *Dayton v. Taylor*, *supra*. This is not a case where the person departing from the street, if this would be a departing, was injured on account of any defect in the ground or in the place to which he had gone. There was no defect in

the market house platform that caused Nitz' injury. If the market platform was not a part of the street, and if Nitz had no right to go there, as is claimed, and he went upon it at his own risk, and on account of a board being out of that, or a hole in it, in some way he had fallen down and been hurt, then the case might be within the rule laid down in the above decision; but if, as is claimed by the city, he went upon the platform and walked over that in safety and sustained no injury until he fell into the excavation caused by the removal of the scales, then we have another question.

We find the testimony is practically uncontradicted that the platform scales were and for a long time had been used as a public street, and one walking thereon would therefore be entitled to the protection one is entitled to in using any public street. So that if the contention of the plaintiff in error be true, that when Nitz went upon the market platform he was departing from the street, still, when he undertook to step upon the scales, or the place where the scales had been, and was injured, the jury were warranted in finding that he was undertaking to walk into and upon a street.

We know of no rule of law and of no decision that holds that under such circumstances he would be deprived of a right to recover. One walking along the street may depart from the highway and walk into a vacant lot or upon city property for some purpose, away from the street, and come back to the street by a different line, and again enter upon it, and if he is not injured when outside the street, but when he comes back to the street he steps into a hole which has been left there through negligence, and is injured, he is not barred of the right to recover. A man has a right to step upon the sidewalk at any point that he chooses, and if he exercises ordinary care, he will not be precluded from recovering because he departed from the street, and was going back to it and upon it. So in this case, if the plaintiff walked upon the platform, and if that was not a part of the street, as the city claims, when he undertook to go where the scale platform had been, and to put his feet upon that, he was entitled to protection, for the scale platform had

been used as a public street for many years, and was in fact part of the street.

We therefore hold that whether the market house platform was a street or a part of a street or not, that of itself would not deprive Nitz of the right to recover on account of walking thereon. Although there is no positive evidence in the case, the circumstantial evidence, the surroundings, as disclosed by the record, indicate very strongly that this platform was in fact used as a part of the street, and that it was as much a part of the street as the two driveways on either side of it, which were used for vehicles. There were steps at each end of it for people to go up and down; it was entirely open at the ends and sides, and there were steps in the middle for people to go upon the scales. The whole place taken together, the platform as well as the driveways, is properly denominated "Market Space," although all was in fact apparently a part of Superior street. But considering this question in the way in which counsel for the city asks us to view it, that this platform was not in fact a part of the street, we think for the reasons given that this, if true, would not deprive Nitz of the right to recover.

There are many objections taken to the charge of the court. The court read to the jury Section 2640, Revised Statutes, which prescribes the duties of a municipal corporation in regard to streets; that it shall keep them open, in repair, and free from nuisance, etc. It is objected that this was error, for the reason that it did not distinguish between streets traveled by the public and public grounds and places like the market house, where people were invited only for certain purposes and at certain times of the day, and that it was an abstract proposition of law not applicable to the case.

We think that there was no error in the court reading this statute to the jury. It sets forth the duty prescribed by the Legislature, a duty which was imposed upon municipal corporations by the common law before this statute was passed, giving statutory construction to the common law; and the judge by reading that statute did not intend to say to the jury, and the jury could not have understood, that he meant to refer to any place that was not in fact a street; but the court intended to

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direct their attention to the place where Nitz claimed he was hurt, and where the practically uncontradicted evidence shows that a street did exist, and had existed for a long period of time.

Objection is taken to the charge of the court as to the duty of the city to protect the public from injury when using streets, and it is objected that what the court said was too emphatic, in stating to the jury that "what does not protect is not sufficient."

The record does not show that anything had been done by the city to protect or guard this excavation. At the most there was nothing there but a comparatively small pile of dirt and a lot of rubbish, which a footman might see or might not. No care had been taken and nothing had been done to guard or protect this excavation. In view of this, we find no error in this instruction of the court.

This language in the charge is objected to, and argued at some length, and insisted upon as error:

"The same rule applies to both. The fact must be shown by the evidence in the case, and the burden is on the man who brings the suit in the first place to establish that the city has been negligent; that it has omitted some duty it owed to him. The burden is upon him to prove that to your satisfaction."

The principal thing objected to is the words "to your satisfaction," and it is urged that that is equivalent to telling the jury that they must be satisfied beyond a reasonable doubt. A decision by Judge Laubie, *Russell v. Russell*, 6 C. C., 294, is cited. If we examine this part of the charge, and read it in connection with what the court said just preceding it, we find that that language only applies to the duty imposed upon the plaintiff below, and does not apply to the city. The paragraph begins:

"When a case starts in this court, it starts without any assumption of negligence on the part of the city or the plaintiff himself. The jury are obliged to decide the case on evidence that is brought here. You can not assume that the city has been negligent, neither can you assume that the man himself has been negligent. The same rule applies to both. The fact must be shown by the evidence in the case, and the burden is on the man who brings this suit in the first place to establish that the

city had been negligent; that it has omitted some duty it owed to him. The burden is upon him to prove that to your satisfaction."

So that if there was any error in the use of this language, it was against the plaintiff below, and not in his favor. Counsel argue that the expression "the same rule applies to both" should be read in connection with the expression "The burden is upon him to prove that to your satisfaction." But the statement "the same rule applies to both" relates to what went before, and not to what came after. So that the city surely can not complain of this charge of the court. Personally, I have never been fully satisfied that it was not proper for a court to say to a jury that they must be "satisfied" of the plaintiff's claims; but this decision of Judge Laubie's is very full and very able; but all that is necessary to say in regard to this portion of the charge, is that the rule as laid down was applied to Nitz and not to the city, and therefore the city was not prejudiced, in any event.

It is objected further that the court said to the jury that:

"He (the plaintiff) is under no obligation to take upon himself the burden of proving that he is free from negligence himself, except in the event of his own testimony showing that he has been negligent. If he discloses by his own evidence that he has been negligent, then it is his duty to relieve himself of that negligence and excuse himself from the negligence that is shown in the case."

It is argued that the expression "his own testimony" limits it to the testimony of the plaintiff alone, and not the testimony of the plaintiff and his witnesses. We do not think that such a restricted construction as that should be given to this language, but that the court meant to say to the jury by using the expression "his own testimony," not only his own individual testimony, but the testimony of the witnesses called by him. In *Robison v. Gary*, 28 Ohio St., 241, this language was used, and is cited by counsel in his brief:

"The evidence of plaintiff as well as of defendant is to be considered in determining the question of contributory negligence, and a charge seeming to confine the jury to defendant's evidence is erroneous."



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The Supreme Court use this expression with reference to the testimony of the plaintiff and his witnesses, and not with reference to the plaintiff alone, as it is urged the jury would understand it. Some other expression in addressing a jury might be better, but we do not find it error to use this language.

What the court said to the jury upon the subject of contributory negligence and the rule upon that question is objected to. The court said:

“On the other hand, if the city claims, as they do claim in this case, that the man was injured through his own negligence, the burden is on the city, in the absence of himself making any such showing in his evidence, to establish that he was guilty of contributory negligence in the case; and by contributory negligence is meant precisely the same character of negligence that on the other side makes the city liable. It must be negligence that constitutes a proximate cause of the injury, one of the causes, one of the proximate causes, of the injury. If the plaintiff is guilty of such contributory negligence as that he can not recover. The burden of showing that he is, is on the city.”

It is urged by counsel that this was in effect telling the jury that the plaintiff could recover unless it appeared from the testimony that his negligence caused the injury; that they should have been instructed, that if his negligence in any degree “contributed” to his injury, he could not recover. Counsel in their brief say: “To establish the contributory negligence of plaintiff the city is required by this instruction to show that ‘he was injured by his own negligence,’ that ‘his negligence constituted a proximate cause of the injury—one of the causes, one of the proximate causes,’ that his negligence ‘proximately caused the injury.’ ”

Examining the language of this instruction, however, we find that the court did not say to the jury that it was necessary to show that this plaintiff’s own negligence was the sole cause of the injury, but taking the instruction altogether, it means that if his own negligence was one of the causes of the injury, if combined with other causes it caused his injury, he can not recover. The court say, “It must be negligence that constitutes a proximate cause of the injury, one of the causes, one of the proximate causes of the injury.” Negligence which contributes directly

to the plaintiff's injury is one of the proximate causes of the injury, and we are not sure but the jury would understand this language better and more readily than the expression "negligence which contributes directly to the injury."

And we find that this or similar language has been used by the Supreme Court of this state, in the case of *Schweinfurth v. Railway Co.*, 60 Ohio St., 215. The court say in the syllabus:

"In an action for negligence, it is not error to refuse an instruction that the defendant can not be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or was a proximate cause of the injury, it does not preclude a recovery."

On page 222 of the opinion the court cite with approval from 2 Thomp. on Neg., page 1151, as follows:

"The negligence of the plaintiff, in order to bar a recovery, must have been a proximate cause of the injury complained of. If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages, if notwithstanding such remote negligence of the plaintiff the defendant might have avoided the injury by the exercise of ordinary care.

"But the negligence of the plaintiff, in order to bar his recovery, must have been so far an efficient cause of the injury that unless he had been negligent, the injury would not have happened; or, as the rule is often expressed, although there may have been negligence on the part of the plaintiff, yet unless he could by the exercise of ordinary care have *avoided the consequences of the defendant's negligence*, he is entitled to recover."

So that we find that this expression that "his own negligence must have been one of the causes of the injury," or "a proximate cause of the injury," is approved by the Supreme Court; and the court below was substantially following the language of this opinion. We find no error in this.

The further ground on which we are asked to set aside the judgment and reverse the case is, that the damages are excessive. The verdict was for \$6,350. This is, to be sure, a large amount of money. The plaintiff at the time of his injury was about fifty-six years of age. He was earning then \$1.25 a day, and worked

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in a lumber yard. The jury were warranted in finding from the evidence that he would never be able to perform such manual labor again as he had been in the habit of performing. The evidence shows that for many weeks and months he was confined to his bed, and that he has been unable to perform any work since he was injured. The testimony of his own physician showed that his lungs were lacerated by the broken pieces of ribs, so that his injury was followed by pneumonia in a very short time—some two or three days—and that he was very ill with that for a long time, and that his lungs are permanently injured by the pneumonia. Both have solidified to some extent, the left one to a considerable extent, and the right one not so much; and this, according to the testimony of his physicians, will always continue. On account of it he is unable to draw a full breath, and suffers inconvenience and pain nearly all the time. Three physicians called by the city testified that in their judgment he had tuberculosis; two of them testified that they had examined his sputum, and found tubercular bacilli in the sputum. There is no evidence that he had had tuberculosis before he sustained this injury, or had shown any tendency in that direction.

The court charged the jury fully upon the question as to his right to recover in case he had had tuberculosis before his injury, or in case there were seeds of the disease in his system that had been aggravated by his injury.

We are of the opinion that his present condition is due to his injuries. The weight of the testimony is that so far as manual labor is concerned, his injury has destroyed his usefulness; that he will suffer from this injury the rest of his life; and that the condition of his lungs is due to the injury which he then sustained. It is true that his earning capacity is not very large. His expectancy of life, according to the tables, at the time of his injury, was about sixteen years. If he were kept constantly employed, he would earn perhaps \$250 or \$300 a year, which would not amount to as much as this verdict; but in cases of personal injury a party is entitled to recover for more than the mere loss of earning capacity. Where death does not ensue, and the party himself brings his action, he is entitled to recover not only for the loss of earning capacity which he has sustained, but to re-

cover compensation for all other injuries and losses that he has sustained on account of the personal injury inflicted; his peace and happiness in life, his health, are something to him—are worth a great deal, perhaps more, in many cases, than earning capacity. The law is that the jury may consider all those things in determining how much, in such a case, the plaintiff is entitled to; they may consider the extent of his injury and its permanence; may consider the pain which he has already endured and which he is likely to endure in the future, in connection with his loss of earning capacity. We can not say, taking all these things into consideration, that this verdict is the result of prejudice or passion. If the claims of Nitz are true, if the testimony of his physicians is to be believed, by this injury his health and physical enjoyment have been, to a great extent, destroyed.

It is hard to put in dollars and cents what ought to be allowed a man who has thus suffered; whose lungs are in such a condition that a full breath, perhaps, can never be drawn by him without pain; who may for the greater part of his life be confined to his house; who from being a strong, healthy man fifty-six years of age, who had never been sick before but once in his life, has become a wreck. Within certain limits the law submits that question to the jury, and under proper instructions from the court they apply to it their common sense, and reason and judgment, and give what in their judgment is a fair compensation for the injury sustained.

The charge on the question of damages can not be complained of, and after a careful examination of the testimony on this question, we hold that we can not disturb the verdict upon the ground that the damages are excessive. The verdict may be larger than some other jury would have given; it may be larger than the court would have given; but the injuries which Nitz sustained were of a very serious character, and that they are permanent there is no question.

We find no error in the record, and for that reason the judgment of the court of common pleas will be affirmed.

*M. R. Brailey and John P. Manton*, for plaintiff in error.

*E. L. Twing and A. C. Bowersox*, for defendant in error.

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**ASSUMPTION OF RISK.**

[Circuit Court of Cuyahoga County.]

MARY JOHNS, ADMINISTRATRIX, v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.\*

Decided, February 1, 1902.

*Master and Servant—Assumed Risk by Railway Employee—Who Knows of the Failure of the Company to Follow the Statutory Provision—Requiring the Blocking of Guard-rails, Switches, etc.—Negligence—Section 3365-18.*

There can be no recovery for the wrongful death of a railway employee, who, knowing of the failure of the company to comply with the statutory requirements as to the blocking of guard-rails, switches, frogs, etc., met his death by catching his foot in an unblocked guard-rail and being run down before he could free himself.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This is a proceeding in error. The case below was brought by the plaintiff in error to recover for the wrongful death of John Johns, who was an employee of the railroad company, and who on April 27, 1897, came to his death by being run over by a car of the railroad company. At the conclusion of the plaintiff's evidence, motion was made to direct a verdict for the defendant, which was sustained, and judgment entered upon such verdict. It is sought here to reverse that judgment.

The railroad company, it is said, was prosecuting its business at the place where the accident occurred, in violation of the statute then in force, Section 3365-18, Bates' Revised Statutes, which reads:

"That every railroad corporation operating a railroad or part of a railroad in this state, shall on or before the first day of June, 1889, adjust, fill or block, all angles in frogs, switches and crossings on their roads, in all yards, divisional and terminal stations where trains are made up, with the best known sheet steel spring guard or wrought-iron appliances approved by the commissioner of railroads and telegraphs."

\*Affirmed by the Supreme Court without report, September 29, 1903.

And then provides a penalty for failing to comply with the provisions of the statute.

It is conceded that at the point where this accident occurred there was a guard rail and it was not blocked. It is said by the defendant in error that it was on a bridge; as a matter of fact, it was on a trestle; but, without determining whether such trestle was a bridge or not, we are able to dispose of this case.

It is urged that if the railroad company was carrying on its business in violation of this statute and the injury resulted from the fact of the man Johns being caught between the guard rail and the other rail, then, in no event, could the railroad company, the defendant, fail to be held responsible; for, it is said, the violation of the statute is such negligence that the employee can not be held to have assumed the risk of such violation, even though he knew all about it.

In *Valley Ry. Co. v. Keegan*, 40 Bull., 167, Judge Taft, of the federal circuit court, delivers an elaborate opinion, holding that one violating a statute in the prosecution of its business, can not avail himself of his employee assuming the risk that comes from the violation of that statute. Judge Taft makes an argument which, to me, is very satisfactory, but is not so to our Supreme Court, which holds directly opposite.

In *Krause v. Morgan*, 53 Ohio St., 26, the second clause of the syllabus reads:

"One who voluntarily assumes a risk thereby waives the provisions of a statute made for his protection. And where the statute does not otherwise provide, the rule requiring a plaintiff in an action for negligence to be free from fault contributing to his injury, is the same, whether the action is brought under a statute or at common law."

The opinion in this case, by Judge Spear, I will not stop to read. It sustains this proposition: That, although the railroad company is in violation of this statute, still one who is in the employ of the company, and knows all about such violation, must be held to have assumed the risk. However hard that doctrine may seem, it seems to be the doctrine of the Supreme Court of Ohio.

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It is said, however, that if he did assume the risk and his foot was caught, still the evidence was such that it should have been submitted to the jury as to whether the railroad company was negligent.

The examination of the evidence shows to us that there was no negligence on the part of the railroad company, unless the negligence was in the not blocking at that point.

The judgment of the lower court is affirmed.

*John O. Winship*, for plaintiff in error.

*E. A. Foote*, for defendant in error.

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**SHERIFF'S RETURN OF SERVICE OF SUMMONS NOT  
CONCLUSIVE.**

[Circuit Court of Cuyahoga County.]

**CHARLES H. PARKER v. VAN DORN IRON WORKS.**

Decided, February 10, 1902.

*Service of Summons—What Constitutes a Proper Service Upon a Corporation—Return of Sheriff as to Service not Conclusive—Evidence Justifying the Setting Aside of a Judgment—Obtained on Faith of a Sheriff's Return.*

1. A return by a sheriff of summons in an action against a corporation which sets forth that on a day named "I served this writ on the within company by delivering a true and certified copy thereof to the treasurer of the company (naming him), the president or chief officers not being found in my county" is in exact conformity with the provisions of Section 5044 relating to service on corporations.
2. But where a judgment based on the faith of such a return is directly attacked for want of service, it is proper upon motion to receive evidence as to the fact whether service was had as shown by the return; and where there is produced an affidavit by the treasurer of the corporation upon whom it is claimed the service was made, in which he states that he distinctly remembers that no summons were served on him in the case in question, a court is justified in vacating the judgment.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The plaintiff here was the plaintiff below. He filed his petition in the court of common pleas against the defendant, which is a corporation. His cause of action set out in the petition was for a personal injury which he claimed to have received while in the employ of the corporation and by reason of its negligence. Summons was issued out of that court upon such petition on November 13, 1899. The summons was returned, endorsed by the sheriff, in the following words:

"On the 14th day of November, 1899, I served this writ on the within named, the Van Dorn Iron Works Company, by delivering a true and certified copy thereof to L. Golden, treasurer of said company; the president or other chief officers not found in my county."

No motion, demurrer or answer was filed by the defendant to the petition. The case remained in court until the September Term thereof, 1901, when a jury was impaneled. Evidence on the part of the plaintiff was introduced, and a verdict rendered for the plaintiff in the sum of five thousand dollars, and judgment was entered upon this verdict. Later in the same term a motion was filed by the defendant to vacate this judgment. Upon hearing, this motion was sustained, and a new trial of the case ordered.

The present proceeding is brought to set aside the order vacating the judgment; the grounds set out in the motion to vacate are that the defendant had no knowledge, until after the trial of the cause, that such action had been commenced, and that there was never any service of summons made upon the defendant, and that no officer, agent or attorney of the defendant ever had notice or knowledge that it was claimed that any summons had been served on the defendant.

On the part of the plaintiff here, it is urged that the return of the sheriff upon the summons is conclusive of the fact that it was served upon the treasurer of the company, and that neither the president nor other chief officer of the company was in the county. This return shows a service in exact conformity with the provisions of Section 5044, Revised Statutes, which provides:

"A summons against a corporation may be served upon the president, mayor, chairman or president of the board of direc-



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tors or trustees, or other chief officers; or, if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent." \* \* \*

That this return, however, is not conclusive, seems to be settled by the holding of the Supreme Court in *Kingsborough v. Tousley*, 56 Ohio St., 450. The first clause of the syllabus reads:

"In an action on a personal judgment, whether rendered by a court of this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment."

This was a suit brought in the court of common pleas by Tousley on a judgment recovered by him against Kingsborough before a justice of the peace of Cuyahoga county. An answer was filed by Kingsborough averring that when the action before the justice of the peace was commenced, and during its pendency, his domicile and residence was in the state of Illinois, and had been for a long time before that, and so continued to be for a long period thereafter, during which time he was not within the state of Ohio, and that no summons was served on him, nor other notice given him, of the commencement or pendency of the suit.

Issue was joined upon this answer, and evidence was received in support of the allegations of the answer; but at the conclusion of this evidence, the court sustained an objection thereto, and held, and so decided, that these allegations were not sufficient to constitute a defense to the matters and things set forth in the petition.

On page 456, Judge Williams, in the opinion, uses this language:

"For while there is some conflict of the decisions as to whether, where there is a presumption of service and jurisdiction or where these appear on the face of the record, it can be shown in a collateral proceeding that in fact no service was had, the authorities are substantially uniform to the effect that when the judgment is directly attacked for want of jurisdiction, such want of service and jurisdiction may be shown, though it be in contradiction of the record.

“But here again the authorities differ as to what constitutes an attack of that nature. It is conceded that it includes proceedings in error, motions to vacate or modify the judgment, and that in some cases it may be made by original action, as was formerly done by bill in chancery to correct or set aside the judgment.”

There would seem to be no doubt from this that the return of the sheriff in the present case was *not* conclusive. It comes within the class which Judge Williams says it is conceded that evidence may be received to contradict the return, for this was a motion to vacate the judgment. It was not error, then, for the court of common pleas to receive evidence that the return of the sheriff was not true.

But it is said that the evidence did not justify the court in holding that the return of the sheriff was incorrect. We have before us a bill of exceptions containing all the evidence upon which the court acted. This evidence was all embodied in affidavits; among them is the affidavit of L. Golden, the man upon whom the return shows the service was made; in this affidavit he, among other things, says that he distinctly remembers that no summons in this action was ever served on him personally. He gives some reasons why he is sure that the summons was not served upon him, but these do not negative his positive assertion already mentioned.

The affidavit of the president of the company is filed to the effect that he had no knowledge of the pendency of the action, and that it would have been his duty to have looked to this litigation if it had come to his notice.

Evidence was introduced on the part of the plaintiff showing that the defendant had been notified by the plaintiff's attorney that suit will be brought, but surely this would not take the place of the service of a summons.

Without saying whether the court would have been justified in vacating the judgment without the affidavit of Golden, we are clearly of the opinion that no error was committed in the making of such order to vacate, and the judgment is affirmed.

*W. H. Polhamus*, for plaintiff.

*F. C. Phillips*, for defendant.

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**SEARCH OF JUNK SHOPS.**

[Circuit Court of Lucas County.]

**JACOB NEIFELD V. STATE OF OHIO.**

Decided, October 26, 1901.

*Criminal Law—Statute Relating to Defects in Indictments Applies to Police Court Affidavits—Failure to Negative the Requirement of the Statute—Answers not Responsive but Competent as Testimony—Prosecution of Proprietor of Junk Shop—For Failure to Retain Property in his Possession for Thirty Days—Officer Searches the Place Without Authority—Conflicting Testimony and Reasonable Doubt.*

1. The provision of Section 7215, that "want of averment \* \* \* or other imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," applies to affidavits and informations as well as to indictments.
2. A charge that the defendant failed and neglected to do is equivalent to charging that he did not do the thing required by the statute.
3. Where an answer by a witness is not responsive, but is proper testimony in the case, it is discretionary with the court whether or not the answer shall stand, and error will not lie to the overruling of a motion to strike out the answer.
4. A direct conflict in the evidence is not sufficient to warrant a reviewing court in holding that the court below erred in finding beyond a reasonable doubt that the defendant was guilty of the offense charged.
5. It is competent to show by oral testimony in the prosecution of the proprietor of a junk shop, under Section 4413, for failing to retain in his possession for thirty days certain old metal purchased by him, that he made a report on the day of the alleged purchase, where the report was in court, and was handed to the witness, and was afterward attached to the bill of exceptions.
6. In the absence of action by a police board authorizing the inspection of junk shops, a police officer who has been directed simply to look after such places, is without authority to enter a junk shop to search for stolen property without a search warrant, and where this is attempted the proprietor of the place does not become liable to prosecution if he resist the officer.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

The plaintiff in error is the same person in both these cases (above entitled and same v. Toledo), and they will be discussed, so far as possible, together, although they must be considered to some extent separately, first taking up the case of Neifeld against the state of Ohio.

Neifeld was prosecuted in the police court of the city of Toledo for the violation of Section 4413, Revised Statutes. A jury being waived, he was tried to the court and found guilty, and sentenced to pay a fine, and it is to reverse this judgment that this proceeding is prosecuted. He was charged with violating the provisions of Section 4413, Revised Statutes, requiring a junk shop keeper to retain in his possession property for a period of thirty days after it has been purchased. The statute provides as follows:

“Any person who purchases, sells, exchanges, or receives second-hand furniture, second-hand articles of any kind, scrap iron, old metal, canvas, junk or lead pipe, except plow irons and old stoves and furniture, shall put up in a conspicuous place, in or upon his shop, store, wagon, boat, or other place of business, a sign, having his name and occupation legibly inscribed thereon, and shall keep a separate book open to inspection by any member of any police force, city marshal or constable, or any other person, in which shall be written, in the English language, at the time of every purchase or exchange of any of the articles above mentioned, a description thereof, the name, description, and residence of the person from whom purchased and received, and the day and hour when such purchase or exchange was made; each entry shall be numbered consecutively, commencing with number one, and any and all of such articles so purchased or exchanged shall be retained by the purchaser thereof for at least thirty days before disposing of the same, and kept in an accessible place in the building where such articles are purchased or received, and a tag attached to such article in some visible and convenient place, with the number written thereon corresponding to the entry number on the book. And any such purchaser shall prepare and deliver every day to the mayor of the city in which such business is carried on, before the hours of 12 o'clock M.,

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a legible and correct copy, written in English, from such book, a description of all such purchases, purchased or received during the preceding day, together with the hour at which the purchase or purchases were made, together with a description of the person or persons from whom the same was purchased."

The plaintiff in error was arrested upon an affidavit purporting to charge him with a violation of one of the provisions of this statute, and an information was thereafter filed in police court, and he was tried upon that information, and found guilty, and sentenced as stated.

There are various errors complained of by the plaintiff in error. First, it is claimed that the affidavit and the information based upon the affidavit are defective, in that they do not charge an offense under this statute. The claim of counsel for plaintiff in error is that the affidavit and the information do not charge with sufficient definiteness that he did not retain the old metal. The language of the affidavit is this:

"And said Jacob Neifeld did unlawfully fail and neglect to retain said lot of old metal, to-wit, said eighty-two pounds copper wire, thirty days before disposing of the same."

And the language of the information is the same.

The statute provides, "And any and all of such articles so purchased or exchanged, shall be retained by the purchaser thereof for at least thirty days before disposing of the same."

It is argued that the affidavit and information should negative the provision of the statute; that the charge should be plainly and distinctly made that he did not retain the articles in question; that that exactly, or in substance, should be the language of the affidavit; and that the language used is not equivalent to charging the plaintiff in error with a violation of the provision of the statute, in that it charges only that he failed and neglected to retain. It is urged that he might have failed to do anything in the way of retaining this property, or might have neglected to retain it, or to do anything to retain it, and still that it might have been retained, and that therefore the affidavit and information do not charge a violation of this section.

We are of the opinion that this language does substantially charge the offense named in this statute; that to charge him with failing to retain the old metal is in substance charging that he did not retain it. It was his duty under the statute to retain the metal for thirty days after its purchase. The affidavit and information charged that he failed to do this. It seems to us that to charge him with failing to retain the metal as provided by statute, is substantially charging that he did not retain it. It certainly was sufficient to notify the defendant below and his counsel of the offense with which he was charged. We can not see that the defendant could have been prejudiced by reason of the language not being more definite in advising him of the charge that was made against him. Section 7215, Revised Statutes, relating to indictments, applies as well to affidavits and informations. The title of Section 7215 is: "What defects in an indictment are not fatal." Then, after reciting various things that are not fatal, the statute provides:

"Nor for want of averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

This statute was considered by the Supreme Court in *Burke v. State*, 34 Ohio St., 79, where there was a conviction for burglary. The Supreme Court say in the syllabus:

"Where the charge is burglary by breaking into the car of a railroad company, designated by its corporate name, but the indictment contains no averment that the company was incorporated, the accused can not avail himself of the defect, if defect it be, in view of the code of criminal procedure."

And in the opinion, which was delivered by Judge Okey, on page 81, it is said:

"A great advance has been made in the laws relating to crimes, punishments, and criminal procedure. The fact is unquestioned that there was a time when felonies, which at common law were few in number, embraced by parliamentary enactments more than two hundred offenses, when acts were punishable with death, which, if committed in this state, at this day, would not be punishable at all; when one charged with felony

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was not permitted to have a copy of or even examine the indictment, to call witnesses in his defense, or to have the assistance of counsel; when no instance could be found in which a jury, in a criminal case, had failed to render a verdict on the same day it was impaneled; when jurors were fined for refusing to return a verdict of guilty; when the ordinary course was to sentence as soon as a verdict of guilty was rendered, and cause the accused to be executed on the following morning, it is not strange that in such a state of the criminal law, humane judges, *in favorem vitae*, would determine cases upon technicalities which at this day would be regarded as frivolous. But all this is changed. Now the tendency is, on the one hand, to disregard that which is merely formal and technical; on the other, to preserve, in every stage of the case, all matters of substance, and afford the accused a trial as full, fair, and impartial as can reasonably be desired, with the presumption of innocence effectual for his protection, until his guilt is proved beyond reasonable doubt."

No objection was made to this affidavit or information until the trial was commenced, and then the objection was made that no evidence could be introduced under the affidavit. We think the affidavit did in fact charge a violation of the statute, and in any event that if there was any defect in the affidavit, it did not prejudice the substantial rights of the defendant below.

It is claimed that various errors were committed by the court in the admission of evidence upon the trial of the case. As appears on page 2 of the bill of exceptions, the prosecuting witness was asked:

"What, if any, report did he, the defendant, Neifeld, make on or about the 8th day of December, 1900, of metal claimed to be purchased by him?"

This was objected to, and overruled, and he answered: "He made a report."

And then follows the question, "Is this the report?" And he answers, "Yes."

We see no objection to this testimony, in view of the fact that the report was there, and was handed to the witness, and was afterwards admitted in evidence, and is attached to the bill of exceptions. It seems from the record that after he made this report, Daley, who was an officer of some kind, went over

to Neifeld's place of business with the report, for the purpose of making an examination of some items contained in the report, and he is asked, on page 4, a question, the answer to which is objected to. The question is this:

"State what, if any further examination you made at that time, of the items." He answered: "I went over to get a better description of the wire, and Neifeld told me he had disposed of it."

Counsel moved to strike out this answer, for the reason that it was not responsive to the question, but the court overruled that motion, and error is claimed upon that answer. It is true that the answer is not responsive to the question. He was asked what further examination he made at the time. He answers by saying he went over to get a better description of the wire. That far the answer is substantially responsive to the question. And then he adds, "And Neifeld told me he had disposed of it." The inference from the answer is that he went over to examine the wire, and did not find it there, and accordingly made no examination, and the witness says that Neifeld told him that he had disposed of it. While the answer is not responsive to the question, it still was proper testimony in the case, and was an admission, of the defendant, that he had disposed of the wire, and was a proper thing to interrogate the witness upon. The witness was cross-examined, and here was an opportunity to cross-examine him fully upon this answer. We think it was a matter discretionary with the court whether this answer should stand or not, not being wholly responsive to the question, and that there was no error in the court overruling the motion to strike out the answer.

It is urged further that the conviction of Neifeld was contrary to the evidence and not sustained by sufficient evidence.

It appears that on December 8, 1900, he filed a report as required by law, that contained in it an item as follows: "82 copper;" and under the head of "description and residence of person selling," "H. W. Cliferton, 819 Colburn St." After this report was filed, Mr. Daley, who said he was a police detective, went over to Neifeld's place of business, and whether



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Neifeld is guilty or not depends largely upon the testimony of Daley and Neifeld as to what occurred upon the occasion of Daley's visits on December 10th and 13th. Mr. Daley testifies that when he went over to Neifeld's place of business after the filing of this report, he found this wire there—saw it there, and talked with Neifeld about it; and that he came back three days later and inquired about it, and Neifeld told him he had sold it or disposed of it. Neifeld denies this, and claims that there was no wire there; that he had no such conversation with Daley; that he did not buy any copper wire at that time; that the copper referred to in his report was not copper wire, but was other material. Neifeld was not arrested for this offense until about a month later.

The question of fact involved here was submitted to the court. It is true there is a direct conflict in the evidence, Daley testifying what he claims about it on the one hand, and is contradicted by Neifeld upon the other. That is not sufficient to warrant a reviewing court in finding that the court below erred in finding beyond a reasonable doubt that Neifeld was guilty of the offense charged. If that were true, a great many criminal cases would have to be reversed on the ground that the judgment was not sustained by sufficient evidence. The court before whom the case is tried has an opportunity to see the witnesses, and observe their conduct on the witness stand, their candor or want of candor, and has a much better opportunity of reaching a just conclusion, and determining where the truth really lies, than a court that knows nothing about the case except what appears in the written record. This rule has been recognized in *Breese v. State*, 12 Ohio St., 146, where the court say:

"A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony."

This man was convicted of burglary. The court say, in a paragraph on page 156:

"The jury who try a cause and the court before which it is tried, have much better opportunities to determine the credi-

bility and effect of the testimony, and we ought, therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court, possessing such advantages, merely because there is an apparent conflict in the testimony. The conflict or its effect might all disappear, if the witnesses were examined before us and we could see and hear them face to face, as they were seen and heard by the court and jury whose verdict and judgment are passing in review before us."

Upon an examination of the whole record we feel that we would not be warranted in disturbing the judgment upon the ground that it is not sustained by sufficient evidence. The judgment in this case is affirmed.

We will now consider the case of the same plaintiff in error against the city of Toledo.

On December 31, Daley again went to Neifeld's place of business, as he claims, to inspect his establishment and some property which he had, Daley being then and there in search of some property that was alleged to have been stolen. Neifeld was charged in this case with resisting Daley, who, it was alleged, was an officer duly authorized in the premises. He was tried before the police court without a jury, and found guilty, and sentenced to imprisonment in the workhouse, and it is to reverse this judgment that this second proceeding in error is filed. Neifeld was prosecuted in this case under an ordinance of the city of Toledo, which is as follows:

"Any person who shall, within the limits of this city, abuse, resist, or hinder any policeman, watchman or any other city officer in the execution of the duties of his office, shall be deemed guilty of an offense, and on conviction thereof shall be fined in any sum not less than five nor more than fifty dollars, and imprisoned at hard labor not exceeding thirty days. And in case of the refusal or neglect of any person to pay such fine and costs, the court shall order such person to be imprisoned at hard labor until the same are fully paid."

Daley was acting, or claimed to be acting, under certain statutes of the state of Ohio which authorize the inspection of junk shops, and which contain other provisions in regard to junk shops, second-hand dealers, etc. The sections referred to are Sections 1917, 1918 and 1919, Revised Statutes. Section 1917 provides that:

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"The mayor and the superintendent of police, and the lieutenants of police within their district, shall possess powers of general supervision and inspection over all pawnbrokers, junk shop keepers, cartmen, hackmen, dealers in second-hand merchandise, intelligence office keepers, and auctioneers within such city; and in the exercise, and in the furtherance of such provisions, may, from time to time, detail members of the police force to fulfill such special duties in the aforesaid premises, as may be ordained by the board."

Section 1918 provides:

"The superintendent and the lieutenants within their districts may, by authority in writing, empower any member of the police force, whenever such member is in search of property feloniously obtained, or in search of suspected offenders, to examine the books of any pawnbroker, or his business premises, or the business of any junk shop keeper or dealer in second-hand merchandise, or intelligence office keeper; and such member of the force, when thereunto authorized in writing as aforesaid, and having in his possession a pawnbroker's receipt or ticket, shall be allowed to examine the property purporting to be pawned, pledged or deposited on such receipt or ticket, in the possession of whomsoever such property may be; but no such property shall be taken from the possessor thereof without due process or authority of law."

The affidavit in this case shows that the prosecution was commenced under Section 1917, Revised Statutes, as it alleges that—

"F. G. Daley, a police officer of said city, while said officer was in the execution of the official duties of his office, to-wit, attempting to inspect old metal in possession of said Neifeld, he, the said Neifeld, being then and there a dealer in junk and old metal, the said police officer being duly authorized and qualified according to law to make such inspection, all of which said defendant, at the time he so resisted, hindered and abused the said police officer, well knew."

Section 1917, Revised Statutes, as has been observed from the reading, provides for the inspection of junk shop dealers.

There are various errors complained of in this case. First, it is claimed that the record in the case does not show that Daley was a police officer. We think, on an examination of the

whole record, although he testifies he was a police detective, that it does show that he was a police officer, and that the evidence in that behalf is sufficient to establish that necessary element in the offense. He testifies also that he was regularly detailed to do this work, and on page 6 of the record he testifies that the defendant knew he was an officer, and in other places in the record he speaks of himself as an officer.

But it is alleged that, although he was an officer, that he was proceeding in this matter without that authority which was required. Daley's testimony shows that he went to Neifeld's place on December 31, and as he reached there, he saw Neifeld coming with a horse and buggy. He took out a basket of lead pipe and took it into his shop. Daley says he followed him into the shop, and when he laid the basket down he said: "Mr. Neifeld, I want to look at this lead pipe; I am looking for something that answers the description of what you have here," and Daley testifies: "And he grabs hold of the basket and says, 'you can't look at anything here without a search warrant;' and he went to the rear of the shop and tried to scatter it in around some barrels he had there, and I said, 'Neifeld, the law requires you to hold this for thirty days,' and he grabbed the basket and said, 'Damn you and the law. Go out of here; you have no right in here at all without a search warrant;' and attempted to put me out of the building, and I arrested him." He then testifies that it occurred in this county, and that Neifeld grabbed hold of his coat and pulled off a couple of buttons. That is substantially all there is of Daley's testimony in chief. There was no evidence that Daley had a search warrant, or that he had any written authority, or that he had any authority in the premises except it be as he testified, that he was detailed to do this kind of work.

There can be no question that before one man can enter another man's premises and interfere with either his person or property, unless he has committed an offense in the presence of an officer, the person so interfering must have some authority of law. The statutes provide that under a search warrant which has been properly issued, premises may be searched, and

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Section 1917, Revised Statutes, provides for the inspection of junk shop keepers and their premises, and it provides that—

“The mayor and the superintendent of police, and the lieutenants of police within their districts, shall possess powers of general supervision and inspection over all pawnbrokers, junk shop keepers, cartmen, hackmen, dealers in second-hand merchandise, intelligence office keepers, and auctioneers within such city.”

So that by those provisions of this section the officers named have general powers of supervision and inspection over such persons; and in the latter part of the statute it is provided that these officers “in the exercise, and in the furtherance of such provisions, may, from time to time, detail members of the police force to fulfill such special duties, in the aforesaid premises, as may be ordained by the board.” There is no evidence in this record that the police board had ever taken any action under this statute, or had ever ordained any duty to be performed in carrying out the provisions of this section. There is no evidence in the record that Daley had any authority whatever for what he did, except as he says he had been detailed to inspect and to look after these places.

We are of the opinion that it was necessary for the city to show the authority which Daley had, if he had any, under this statute; that it was necessary for the city to show that the police board had ordained certain duties to be performed, and that he had acted within the limits of the duties that had been prescribed by the police board. The power to enter a place of business at any time, and inspect it, or take possession of property, is rather a wide power, and might be abused; and the statute evidently was intended to throw around it restrictions and limitations, and to only authorize the officer to exercise such power and perform such duties as had been prescribed by the police board.

It is not necessary to cite authorities to show that an officer has no power except in certain cases to arrest without a warrant, or interfere with the personal property of another. It has been held a great many times. It has been held by the Supreme Court that one could not be properly convicted of re-

sisting a supervisor of roads, where the statute under which the supervisor was acting was unconstitutional (*Hendershot v. State*, 44 Ohio St., 208). Although the officer in that case, as the statute read and stood upon the statute books, had authority, he in fact had none, because the statute was unconstitutional.

If it should be claimed that he was acting under Section 1918, Revised Statutes, which refers to the examination of books, we find upon an examination of it that that section requires authority in writing. It provides that—

“The superintendent and the lieutenants within their districts may, by authority in writing, empower any member of the police force, whenever such member is in search of property feloniously obtained, or in search of suspected offenders, to examine the books,” etc.

We are not advised under which statute the city was proceeding, as no brief was filed by counsel for defendant in error. We have considered both of the sections, and the evidence shows in this case that Daley was in search of property claimed to have been stolen. If it should be claimed that he was acting under Section 1918, Revised Statutes, then it is clear that he was acting without authority, because he had been given no authority in writing as required by this section.

Daley having no authority to enter Neifeld's place of business and take possession of his property, Neifeld had the right under the law to resist him, as he would any other person under the same circumstances. The fact that he knew Daley was an officer, if he had such knowledge, did not affect his rights. He was arrested there and then by the officer for the offense of resisting an officer. We are of the opinion that the city failed in the respects mentioned to make a case against Neifeld, and therefore the judgment should be reversed, for the reason that it is not sustained by any evidence upon these material elements in the case. We find no other errors in the record. The judgment will be reversed for the reasons stated, and the case remanded for a new trial.

*Seney & Johnson*, for plaintiff in error.

*M. R. Brailey and C. E. Sumner*, for defendants in error.

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**WITHDRAWAL OF CONSENTS VALID.**

[Circuit Court of Cuyahoga County.]

**CITY OF CLEVELAND v. CLEVELAND CITY RAILWAY CO. ET AL.**

Decided, March 20, 1902.

*Street Railways—Consents by Abutting Owners to Building of—No Jurisdiction over Action of a Property Owner in that Behalf—Withdrawal of Consent for a Consideration, Valid—Injunction on Grounds of Morality.*

1. An abutting lot-owner may give or withhold or withdraw consent to the building of a street railway in front of his property, and whether he does the one or the other he incurs no liability, legal or equitable, to the city or its citizens on the one hand, or to an individual or corporation proposing, on the other hand, to construct and operate the railway under a contract with the city; and his action or motives in that regard do not give jurisdiction over him to any court.
2. The proprietor of a street railway is not an agency of the state performing governmental functions which a threatened withdrawal of the consent of an abutting property owner would wrongfully obstruct.
3. It is not for courts to pass upon or attempt to regulate the morality of an action, unless a point is reached where some legal or equitable right is involved; and a withdrawal of consent by an abutting property owner to the building of a street railway, induced by a money consideration paid by a competing company, does not present such a case.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

These cases come into this court by appeal, and are submitted upon a general demurrer to the petition.

The same relief is asked in each petition, and substantially the same averments are contained in each. From these averments it appears that the city, by ordinance, designated a route through certain streets of the city for a street railroad route, and, by ordinance, prescribed the conditions upon and the manner in which the proposed railroad should be constructed and operated. This being done, the clerk advertised for proposals to construct the proposed road, and in response to such notice the plaintiff in one of the cases, Hoefgen, submitted a proposal to construct

and operate the road in accordance with the terms and conditions prescribed in the ordinance, and to carry passengers at a three-cent fare on the proposed road. He submitted also with his bid a deposit of \$50,000 at the time of the proposal, to insure the faithful performance on his part of the terms of the proposals made.

His was a bid proposing to carry passengers for the lowest rate of fare; indeed, I suppose it was the only proposal submitted, although that does not appear from the petition.

It is then alleged that the defendants, the railway companies, confederated and conspired with the other defendant, they being in a monopoly of the street railroad business of the city, to defeat the city and this proposed contractor in the prosecution of this enterprise by inducing certain land owners along the route of the proposed railroad to withdraw consents already given to its construction, and wrongfully inducing other land-owners to withhold consents by the use of corrupt and unlawful means, including the payment of money to accomplish such purpose. It is alleged that unless restrained by the order of the court, these corporations will pay to certain lot owners money for the consideration of the withdrawal and withholding consents already obtained. The court is asked to enjoin the doing of these threatened acts.

The question is: Do the petitions, or either of them, make a case for the relief asked? If the acts, which is alleged are threatened, will infringe or invade any of the rights of the plaintiff in either case, legal or equitable, then the demurrers to these petitions should be overruled; but, if no such effect follows from the doing of the acts that are alleged to be threatened, then the demurrer should be sustained.

Proceedings are had for the establishment of this railroad, under Sections 2501 and 2502, Revised Statutes. The provisions relating to the consent of lot owners are found in Section 2502, Revised Statutes, and provides in substance, that no contract by the city can be made for such improvements unless the contractor "shall have previously obtained the written consent of a majority of the property holders upon each street, or part



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thereof, on the line of the proposed street railroad, represented by the feet front."

It will be observed that the Legislature has not conferred the unlimited power upon the municipalities to permit streets to be used for railroad purposes, but only such streets as a majority of the property owners consent to such use. Without such consent the city is not clothed with power to authorize the construction or operation of a street railroad on the streets designated in this proposed route.

It will be conceded that neither the city nor Hoefgen has any cause of action against the lot owners for either withholding or withdrawing consent. The lot owner may give or withdraw his consent at will. It is, however, a voluntary matter with him. Whether he does the one or the other, he incurs no liability, legal or equitable, to the city, its citizens or an individual, or corporation proposing, under contract with the city, to construct and operate a railroad in the street on which he resides. The lot owner, by remaining passive, is wholly outside of the controversy—no party to the transaction, and in no sense responsible for the success or failure of the enterprise. Moreover, his reasons or motives for giving or withholding consent are wholly immaterial. The fact that one is a lot owner upon one of the streets upon which it is proposed to construct this railroad does not confer upon any tribunal jurisdiction to inquire into his motives for giving or withholding his consent, or in any way to question his right to thus act.

It is said, however, that a third party who induces this lot owner, by persuasion or by the payment of money, to withhold his consent which neither the city nor the contractor has any legal or equitable right to claim, violates the legal or at least the equitable rights of the city and the contractor; that in some way there is created in favor of the city and contractor a cause of action, legal or equitable, for inducing the lot owner to withdraw his consent for which no cause of action, legal or equitable, is created against him. This would seem to be most extraordinary if true. We are cited to no case, and have found none, sustaining or tending to sustain such a proposition.

Our attention is called to an unreported decision of the circuit court in Butler county, Ohio, wherein it is held that the consent of a lot owner purchased by the proposed bidder can not be counted. This may be correct. The bidder seeking a contract with the city in his own interest, can not purchase consent of a lot owner. The transaction is one directly connected with the proposed contract, and involves the acts of one of the parties thereto, and the courts hold that he can not take advantage of his own wrong. The rights of a lot owner are not discussed in that case at all. There is no analogy between that case and the one we are considering. Dealings between lot owners and third parties upon a subject-matter which he alone controls and over which the city has no authority whatever, is, in our judgment, wholly without the jurisdiction of courts, to control at the instance of the city or the proposed contractor. We are of the opinion that by the averments of the petition no invasion or impairment of the legal or equitable rights of the city or the contractor is shown.

One other phase of the case may be reverted to but not discussed. We do not think that these petitions can be sustained on the theory that the proprietor of a street railroad is an agency of the state performing a governmental function which the threatened transaction will wrongfully obstruct, in a way to give the court jurisdiction to enjoin.

A street railroad is not strictly a street improvement. It provides a means of transit for public benefit and convenience, no doubt, but is, nevertheless, a private enterprise of an individual or corporation, subject to such regulations and restrictions as are provided by statute and that the municipality is authorized to impose. The individual or corporation exercises complete dominion over the property invested in such enterprise.

The city, charged with the control of the streets, may or may not, with the consent of the majority of the property owners thereon, permit the use of the street for such purpose, but the city is not authorized in its governmental capacity to become the owner of a street railroad and to prosecute the business incident to such ownership, nor can it confer, in our judgment,

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governmental function upon the proprietor of such street railroads to prosecute such enterprise.

The morality of the act sought to be prevented by injunction is not for courts to pass upon or attempt to regulate unless a point is reached where some legal or equitable right is invaded. Independent of any impairment of such rights, the remedy must be sought with the Legislature and not with the courts.

We are of opinion that these petitions, neither of them, state a cause of action upon which the relief asked can be granted, and the demurrer to each is sustained and the petitions dismissed.

*Beacon, Baker & Payer*, for plaintiff.

*Squire, Sanders & Dempsey* and *A. F. Ingersoll*, for defendants.

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#### RIGHT OF ONE ACCUSED TO AN INQUIRY AS TO HIS SANITY.

[Circuit Court of Hamilton County.]

ROSSELOT V. STATE.\*

Decided, March 21, 1902.

*Criminal Law—Defense of Insanity—Section 7240 Mandatory—Denial of Right thereunder is Reversible Error.*

1. The provisions of Section 7240, relating to the submission of the question of the sanity of an accused person to a special jury, are mandatory.
2. Where one accused of homicide sets up the defense of insanity, he is entitled to a trial on that issue before a jury impaneled for that purpose only, and if found insane his trial on the truth of the indictment shall not proceed.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

Heard on error.

The plaintiff was tried and convicted in the court of common pleas of the crime of murder in the second degree.

After the jury had been sworn, and during the progress of the trial, the aforesaid Rosselot's counsel suggested to the court

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\*Affirmed by the Supreme Court (69 O. S., 91).

that Rosselot was insane, and produced to the court the certificate of one John T. Booth, who represented himself as a reputable physician practicing medicine in the city of Cincinnati. Said Dr. Booth represented to the court that he had examined the said Rosselot and found him to be an insane man, and wholly unable to give any assistance to his counsel or give evidence as a witness; and defendant requested the court to have a jury impaneled under the provisions of Section 7240, Revised Statutes, to try the question as to the sanity of the defendant. This the court refused to do, and defendant excepted.

The court gave as its reasons for not granting the request the following:

“But I am of the opinion that this is not the proper time to take advantages of the proceedings provided for in that section to test the defendant’s sanity, and the court wishes it to be made a part of the record that when the defendant was brought into the court for trial yesterday morning, December 16, that no objection was made by Mr. Cogan, the only counsel for the defendant then present, upon the ground that the defendant was mentally incapable of going to trial. Mr. Cogan entered a protest to proceeding with the trial and desired that his exception be saved to the ruling of the court that he must proceed with the trial. The court made inquiry of various persons after the defendant was brought into court to ascertain if he was in mental condition to proceed with the trial, and was satisfied at the time that he was, and thereupon ordered the trial to proceed. It is the opinion of the court at this trial therefore that the defendant is able to proceed with the trial, and the trial must go on.”

It should be noted that Mr. Shay, the leading counsel of defendant, was not present at the beginning of the trial, but made said suggestions soon after he entered on the trial of the case.

Section 7240, Revised Statutes, provides:

“When the attorney of a person indicted for an offense suggests to the court in which the indictment is pending, at any time before sentence, that such person is not then sane, and a certificate of a respectable physician to the same effect is presented to the court, the court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impanneling.”

This provision of the statute is mandatory, and the court must comply with the same provided the party indicted has brought himself within its provisions. Undoubtedly the court in the first instance is vested with the power to determine whether or not the attorney of one indicted for an offense suggests to the court the insanity of the accused and whether or not a certificate of a respectable physician is presented suggesting said insanity of the accused; but these provisions of the statute having been complied with, nothing remains for the court to do but to proceed in accordance with the requirements of the statute to impanel a jury and try the question of the sanity of the defendant.

In this cause the court refused to comply with the statute, but took upon itself to determine whether the defendant was sufficiently sane to proceed with his trial. The trial proceeded, and the defendant was convicted of the crime charged in the indictment, and sentenced, as required by law. The result is that the defendant was denied the right to have his sanity tried by a jury, under the provision of this section, when he had complied with its provisions, there being no suggestion in the record that the attorneys of the defendant did not suggest the insanity of the defendant, or that the defendant did not also present a certificate of a respectable physician to the same effect.

The defendant had the right to be tried by a jury as to his sanity at the time of the impaneling of the jury. If insane, the trial should not have proceeded, for it is the intent of the law that a man shall not be tried on an indictment at a time when he is insane. And whether he is insane or not, he is to be tried by a jury impaneled for that purpose alone, and not by the judge or jury which is impaneled to try the issue as to the truth of the indictment.

In refusing to submit this question to a jury, we think the court erred, and for this error the judgment should be reversed, and cause remanded for further proceedings.

*Shay & Cogan*, for plaintiff in error.

*Louis B. Sawyer* and *Arthur C. Minning*, for defendant in error.

**ACTIONS AGAINST THE ESTATE OF AN INSOLVENT.**

[Circuit Court of Cuyahoga County.]

C. W. CORNELL ET AL V. AUGUST SULTER ET AL.

Decided, December 16, 1901.

*Insolvency—General Assignment—Fraudulent Transfer—Suit to Set Aside Should be Prosecuted by the Assignee—Creditors can not Sue after Assignment—Jurisdiction of Common Pleas—Exclusive Jurisdiction of Courts of Insolvency.*

1. A general assignment for the benefit of creditors transfers to the assignee all the rights of the assignor and his creditors in the property covered by the assignment, which includes the interest of the assignor in property held in pledge.
2. The assignee is the proper party to prosecute an action to set aside a fraudulent transfer of property by the assignor, or to determine the rights of persons claiming liens on any of the assigned property, whether held by pledge or otherwise.
3. A general creditor can not, after a general assignment, maintain an action under Section 6344 to have a conveyance or transfer of property, fraudulent as to creditors, declared to be an assignment for the benefit of creditors; but where the assignee refuses to prosecute an action for the recovery of such property, a creditor may proceed in an action in equity as a *cestui que trust* for the protection of himself and others.
4. Courts of insolvency have exclusive jurisdiction in all matters of assignments for the benefit of creditors, in which an adequate remedy can be granted in such courts; and where an assignee has attempted to reach property fraudulently transferred and to marshal liens, the common pleas court is without jurisdiction to set aside a conveyance alleged to have been fraudulent, or to attack the validity of the order made by the court of insolvency. The jurisdiction of the court of common pleas in that behalf is not broadened by making the assignee a party to the suit.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Heard on appeal.

This case was submitted on a motion for a judgment on the pleadings. The foundation of such motion rests on the claim that the court of common pleas had no jurisdiction of the action.

We will not attempt to analyze the pleadings filed in the case, which are very voluminous. A very exhaustive review of

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the pleadings has been made by counsel upon either side. The following facts, however, appear from the pleadings, and necessary inferences to be drawn therefrom.

On June 18, 1898, August Sulter made a general assignment to — Lacy of all his property of every kind and nature. The deed of assignment was on the same day filed in the court of insolvency.

At the time of this assignment a large amount of property owned by Sulter was in the possession of Benton & Co., upon which they claimed a lien for certain advancements made to Sulter prior to the assignment, for the security for the payment of which such property was held in pledge by them. Certain other property of the assignor was in the possession of the Sheriff Street Market & Storage Company for which warehouse receipts had been issued by that company. The receipts so issued to Sulter had been by him transferred to the German-American Savings Bank Company as claimed by the bank as security for certain loans made by it to Sulter. George A. and Richard B. Sulter, sons of August Sulter, the assignor, each claimed a lien upon said property by virtue of mortgages issued to them by their father.

We think it plain that all the right, title and interest of the assignor by his assignment passed to and vested in his assignee as well as to this as his other property.

On June 20, 1898, an inventory and appraisal of the property so assigned was made and filed in the insolvency court.

On July 9, 1898, the assignee, Lacy, filed his petition in the court of insolvency, attacking all the liens upon the property held by Benton & Co. and by the Sheriff Street Market & Storage Company, and asking for an order for the sale and marshaling of the liens on the said property. Proceedings prosecuted in said court in that action resulted in a decree marshaling the liens on the said property and ordering the same sold and the proceeds distributed in accordance with the findings of that court.

On June 23, 1898, five days after the assignment by Sulter, this action was commenced by Cornell and others, unsecured creditors of Sulter. The petition states, among other things:

“This suit is brought by plaintiffs pursuant to the provisions of Section 6344, Revised Statutes, for the benefit not only of themselves, but of all such creditors of said August Sulter as may comply with the provisions of said Section 6344.”

The object of this action was to have declared void the mortgage liens of George A. and Richard B. Sulter, and also the liens of Benton & Co. and the German-American Savings Bank Co.

By some of the defendants in this action at least, the jurisdiction of the court of common pleas is denied and the facts upon which that denial is based specified. For some reason, not appearing upon the record, the plaintiffs who brought the action have ceased to prosecute the same, but other general creditors having been made parties to the action are continuing the prosecution. These creditors now prosecuting the action were parties to the action brought in the court of insolvency by the assignee, in which it was sought, as already stated, to settle the rights of all the parties to the property involved in this action.

Since the proceedings in the court of insolvency, the assignee, Lacy, has been superseded by Fogle, trustee. In their answers, cross-petition and replies these creditors and Fogle, trustee, attack most vigorously the proceedings in the court of insolvency, and assert that the judgment of that court was brought about, and the assent of the court to the judgment there entered, by the grossest fraud and conspiracy by the assignee, Lacy, and the pretended lien-holders to that property who conspired to cheat and defraud the unsecured creditors of said assignor, Sulter.

Had the court of common pleas jurisdiction of this action, and have we any upon appeal?

We hold that the jurisdiction of the court of insolvency in matters of assignment is exclusive in all respects in which it is adequate to grant the proper relief. Certainly all the proceedings had in that court were strictly within its jurisdiction.

Counsel for Fogle, trustee of the unsecured creditors, answered this question as if there had been no adjudication or attempted adjudication in the court of insolvency.



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If there had been no assignment, then a general creditor might commence an action under favor of Section 6345, Revised Statutes, to obtain the relief here sought. If after a general assignment the assignee refused, on request, to bring action to set aside a fraudulent conveyance and to have declared fraudulent and void, mortgages given without consideration, it is not asserted that an unsecured creditor might not bring such action, and that the court of common pleas in such case would not have jurisdiction.

It is conceded in this case that an assignment had been made by Sulter, that the assignee had prosecuted his action in the court of insolvency to determine whether this property had been fraudulently conveyed by Sulter before the assignment and to determine whether any of said liens were fraudulent and void; in which action he sought to marshal the liens and procure a sale of said property.

No request of, or refusal by, the assignee had been made to prosecute this action.

Under the allegations of the petition, clearly the court of common pleas had no jurisdiction of this action.

An assignment having been made covering, as we hold, all the rights of the assignor in this property, it was the duty of the assignee who, by virtue of this assignment, became possessed of all the rights of the assignor and also all the rights of the creditors in the property embraced in the assignment, to enforce all such rights. Nor is the jurisdiction of the court of common pleas enlarged by the answers of the unsecured creditors in attacking the proceedings in the insolvency court as brought about, and the assent of the court obtained to the decree and judgment rendered by fraud on the part of such assignee and the secured creditors. Nor is it material whether or not the judgment of the court of insolvency has been vacated. The action brought in that court has been either finally disposed of or is still pending, and, in either case, the exclusive jurisdiction was in that court. The attack made upon the proceedings of that court as fraudulent can not avail in this action. Parties must either abide by the judgment therein rendered, or seek a review by direct proceedings in error.

From the conceded facts appearing by a careful analysis of the pleadings, we deduce the following propositions which we deem applicable to the case:

First. A general assignment for the benefit of creditors transfers to the assignee all the rights of the assignor and his creditors in the property included in the assignment. This includes all the rights of the assignor in property held by a pledgee as security for a debt.

Second. The assignee is the proper party to prosecute an action to set aside a fraudulent transfer of property or to determine the rights of persons claiming liens on any of the assigned property by pledge or otherwise.

Third. No action can be maintained under Section 6344 of the Revised Statutes of Ohio, by a general creditor after a general assignment to have a conveyance or transfer of property fraudulent as to creditors, declared an assignment for the benefit of creditors.

Fourth. The creditor may, on refusal of the assignee to prosecute such action, prosecute an action in equity as a *cestui que trust* for the protection of himself and others, but this he can only do when the assignee on request refuses to act.

Fifth. It clearly appears that the assignee not only did not refuse to act, but did himself prosecute an action in the court of insolvency having jurisdiction of the subject-matter of the parties to accomplish every object sought to be attained in this action.

Sixth. The fact that the assignee was made a party to this action in any way, neither operates to change the rights of the parties, or extends the right of the creditor to maintain this action.

Seventh. The court of insolvency is clothed with exclusive jurisdiction in all matters of assignment under our statutes, in which an adequate remedy can be given by that court, and the prosecution of the action in that court by the assignee as attempted by the trustee, Fogle, and the unsecured creditors, takes from them any right they might otherwise have to maintain this action.

The motion for judgment upon the pleadings is sustained.

*J. O. Winship*, for prosecuting creditors and trustee.

*W. W. Reynolds, Brewer, Cook & McGowan* and *John C. Heald*, for *W. J. Benton & Co.*

### PETITIONS IN ERROR IN COMMON PLEAS.

[Circuit Court of Mahoning County.]

WILLIAM BROBST<sup>9</sup> v. VILLAGE OF CANFIELD.

Decided, March Term, 1903.

*Petitions in Error—Refusal of Leave to File in Common Pleas—For Violation of an Ordinance—Reviewable in the Circuit Court.*

The granting of leave to file a petition in error in common pleas for the review of a judgment of conviction under a municipal ordinance is a matter of discretion, and where leave to file is refused the action of the court in so doing is reviewable in the circuit court and where the errors complained of are substantial, the refusal of leave to file will be reversed with directions to permit the filing.

COOK, J.; LAUBIE, J., concurs; BURROWS, J., dissents.

Heard on error.

Plaintiff in error, William Brobst, was convicted in the municipal court for the violation of an ordinance of the village of Canfield, Mahoning county. He made application to the court of common pleas for leave to file a petition in error under Section 1752, Revised Statutes, which was refused, the court placing upon the journal such refusal, to which exception was taken by plaintiff in error, and he now prosecutes error in this court to reverse the order of the common pleas court in refusing leave to file the petition in error.

The contention of defendant in error primarily is that this court has no jurisdiction to review the action of the common pleas court in refusing leave to file the petition in error.

Has this court such jurisdiction? A majority of the court thinks it has. Section 7356, Revised Statutes, provides:

“In any criminal case including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court.”

The court of common pleas therefore had jurisdiction to review the conviction under the ordinance.

Section 6709, Revised Statutes, provides:

“A judgment rendered or final order made by any court of common pleas or a judge thereof, may be reversed, vacated or modified by the circuit court of the county wherein such court of common pleas is located, for errors appearing upon the record.”

Section 6707, Revised Statutes, provides:

“An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this title.”

It is claimed on behalf of defendant in error that there was no action in error pending before the common pleas court because no petition in error had been filed. True, but was it not a special proceeding? Application had been made to the court for leave to file a petition in error; it was done by motion properly filed, of which due notice had been given to the village; the court passed upon the motion, overruling the same, refusing the leave, and making the proper entry on the journal of such refusal.

The case of *Missionary Society v. Ely*, 56 Ohio St., 405, was a proceeding in the probate court for the probate of a will. Probate of the will was refused in the probate court; it was appealed to the common pleas court and again probate of the will was refused. A petition in error was filed in the circuit court, and that court dismissed the petition, assigning as the reason for such dismissal that it had no jurisdiction to review the action of the common pleas court. The Supreme Court held:

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"1. An application to the probate court to admit an alleged will to probate is a special proceeding within the meaning of that clause of Section 6707, Revised Statutes, which provides that an order affecting a substantial right made in a special proceeding is a final order which may be vacated, modified or reversed, as provided in Title IV of the Revised Statutes.

"2. The order of the common pleas refusing to admit to probate is a final order affecting a substantial right, from which error may be prosecuted to the circuit court, and that court has, by virtue of Section 6709, Revised Statutes, jurisdiction to reverse, vacate or modify such order for error appearing on the record."

In the opinion Spear, J., says, p. 407:

"The contention being whether or not the circuit court had jurisdiction to review the order of the common pleas, the first inquiry naturally is as to the character of that court, and the character of its order refusing to admit the alleged will to probate. Was it a special proceeding, and was the order a final order?

"As to the first inquiry, it seems to us there can be but little difficulty. Our code does not, as does the code of New York, specify that every remedy which is not an action is a special proceeding, nor does our statutes give any definition of an action or a special proceeding. But we suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving the process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding. As given by Bouvier, a remedy is 'the means employed to enforce a right, or redress an injury.' Section 5921, Revised Statutes, and cognate sections, give a right to any person to whom any estate has been devised or bequeathed by any last will or to any person interested therein to propound such will for probate, and the proper proof being made that the will was duly attested and executed, and that the testator, at the time of executing the same, was of sound mind and memory, of full age, and not under any restraint, the right exists in the proponent that the court shall admit the will to probate. In no other way can he enforce his right to have the benefit of the provisions of the will. The court, by the mandatory requirement of

the statute, is called upon to determine as to the existence of the right, and it being ascertained that the paper presented is the last will of the deceased, its admission to probate follows as a legal necessity. The law having conferred the right, and authorized an application to a court of justice to enforce it, the proceeding upon such application is of a judicial nature, and, not being an action within the sense of the code, it follows that it belongs to that class known as special proceedings."

It may be claimed that the order of the common pleas court was not final; that application could be made again to the court. If it could, which is more than doubtful, it would have to be made to the same court and upon the same record, and its action under those circumstances would seem to be final; and, furthermore, Section 1752, Revised Statutes, provides that in case of affirmation or reversal by the common pleas, the judgment may be reviewed in the circuit court. That it affected a substantial right there can be no doubt, as it absolutely determined the right of plaintiff to have the action of the municipal court reviewed.

Finally, it is claimed that Section 1751, Revised Statutes, in effect declares that the refusal of the common pleas court to grant the leave to file a petition in error is final; that in terms it determines that it is not reviewable, and upon this last question only is there any disagreement among the members of the court. The section, so far as important to this inquiry, provides:

"A conviction under an ordinance of any municipal corporation may be reviewed by petition in error, in the same manner and to the same extent as was heretofore permitted on writs of error and *certiorari*, and the judgment of affirmance or reversal may be reviewed in the same manner; and for this purpose a bill of exceptions may be taken, or a statement of facts embodied in the record on the application of any party; but no such petition shall be filed except on leave of the court or a judge thereof, and such court or judge has power to suspend the sentence, as in criminal cases."

It will be observed, as we have heretofore stated, the section provides that the judgment of the common pleas court of

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affirmation or reversal may be reviewed as in other cases, showing that the intent of the Legislature was that the same proceedings should be had as in ordinary criminal cases. Under such circumstances we do not think it possible that it was the intention that, in the first instance, the common pleas court could finally close the door to any investigation of the errors that might appear upon the record, however plain and flagrant. If such was the intention, it certainly would have been expressed in plain and unequivocal terms and not left to inference. Violation of ordinances of municipal corporations are often attended with severe penalties, both by fine and imprisonment, and where our statutes so generally provide for review by proceedings in error, both in civil and criminal cases, the presumption should be very strong that the intention of the act was to prevent review before we could give it such construction.

We do not say that the common pleas court may not be justified in refusing leave to file a petition in error; what we hold is that it is a matter of discretion, a legal discretion, and a final order in a special proceeding which is reviewable, and if the circumstances in each particular case show that the petition should have been filed and the case fully heard upon the errors complained of, this court will reverse for error in refusing the leave.

Counsel for the village calls attention to the case of *Rothwell v. Winterstein*, 42 Ohio St., 249. We do not think that case applicable to this case. That was a case in forcible detainer. In such case the judgment is not final, the statute expressly providing that the judgment should not be a bar to any after-action brought by either party, and, as we understand the case, that was the reason for the holding that the refusal of the common pleas court to allow a petition in error to be filed was not reviewable.

We have looked into the errors assigned in the motion for leave to file the petition in error, also as found in the record, and we find them not to be trivial, but substantial and such as should be fully and carefully considered, and, without express-

ing any opinion upon them, it is ordered that the order of the common pleas court, in refusing leave to file a petition in error, be reversed, and the common pleas court directed to permit the filing of the petition in error.

*E. N. Brown*, for plaintiff in error.

*C. A. Manchester*, for defendant in error.

Burrows, J., dissents.

I place my dissent in this case upon the provisions of Section 1752, Revised Statutes, that "A conviction under an ordinance of any municipal corporation may be reviewed by petition in error; \* \* \* but no such petition shall be filed except on leave of the court or a judge thereof."

It is not suggested that the court here mentioned is other than the court of common pleas. Neither is it suggested that the language or meaning of this section is uncertain.

In unequivocal terms it requires the leave of the court of common pleas or a judge thereof, as a condition precedent to the review of a conviction under an ordinance. Since this right to review does not exist except when given by statute, it follows that the refusal of the court of common pleas to allow the petition in error to be filed precludes any further proceedings upon such petition. But it is claimed that this court may review and reverse the order of the court of common pleas refusing such leave, by virtue of the power given the circuit court in Section 7356, Revised Statutes, to review the judgments and final orders of the court of common pleas.

Conceding that the refusal of leave is a final order, still the circuit court has jurisdiction by Section 7360, Revised Statutes, only to affirm or reverse judgments; and can reverse those only that are in their nature and character reversible. An affirmance or reversal in this case would alike leave the plaintiff in error out of court.

To give relief to the plaintiff in error this court must go farther and allow the petition in error to be filed in the court of common pleas. And this, in effect, would amend Section 1752,



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Revised Statutes, so that a petition in error could, in such cases, be filed in the court of common pleas on leave of that court or a judge thereof; or, when refused by them, on leave of the circuit court.

If this position is correct, then by Section 7306a, Revised Statutes, this judgment, if reversed by the circuit court, may be reviewed in the Supreme Court. The manifest purpose of the exception in Section 1752, Revised Statutes, is to shut the door of the common pleas against all petitions in error from convictions for municipal offenses which that court or a judge thereof considers lacking in legal merit. This evident purpose of the Legislature is thwarted by the decision made in this case. The grant of power to allow or refuse applications in these cases must, in the nature of the case, be discretionary and exclusive. Any other construction, instead of putting an end to cases whose merit is thus condemned, would give to such offenders an enlarged opportunity for litigation and delay.

#### **INJURY TO BRAKEMAN THROWN FROM MOVING TRAIN.**

[Circuit Court of Lucas County.]

**LAKE SHORE & MICHIGAN SOUTHERN RY. CO. v. FRED. VOGELSON.**

Decided, January 14, 1902.

*Negligence—Railways—Brakeman Falls from Caboose—Evidence as to Contributory Negligence—Failure to Disclose at the Time of the Accident One of the Alleged Causes—Custom as to Signaling—Compromise Verdict—Settlement.*

1. Where an employe who has been injured in an accident fails to mention one of the alleged causes at the time his statement is taken following the accident, doubt is cast upon his testimony as to such alleged cause, when made long after in court in support of a claim for damages.
2. In the absence of evidence of a custom of giving a signal before cutting off an engine used as a pusher in helping a freight train over a grade, the failure to give such a signal on the occasion of the accident is not negligence, if the engine was cut off in the usual manner.

3. A finding by a jury against a claim of settlement is against the weight of the evidence, where the claim of settlement is supported by the fact that after coming out of a hospital where he was treated at the expense of the company, the plaintiff accepted a sum of money and signed a receipt in full of all claims growing out of the accident, and remained in the employ of the company for two years without complaint, and the only evidence against the claim of settlement is that given by the plaintiff four years after the accident.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

The defendant in error in this action was the plaintiff below, and brought his action against the Lake Shore & Michigan Southern Railway Company to recover for personal injuries which he claimed he sustained on account of negligence of the railway company. The case was tried to a court and jury, and at the conclusion of the plaintiff's testimony the defendant moved the court to instruct the jury to return a verdict for the defendant. This motion was overruled and the case proceeded and a verdict was finally returned by the jury in favor of the plaintiff for the sum of \$500. Motion for a new trial was made by the defendant, which was overruled and a judgment entered in favor of the plaintiff for the amount of the verdict, and it is to reverse this judgment that a petition in error was filed in this court.

There were two general defenses by the railway company: First. That it was not guilty of negligence.

Second. That whatever claim the plaintiff had against the company was settled, and that for a valuable consideration he released the company from all liability.

Evidence was offered to sustain both these defenses.

The plaintiff in error claims that the court erred in refusing to take the case from the jury at the conclusion of plaintiff's testimony; and next, in overruling the motion for a new trial, on the ground that the verdict was not sustained by sufficient evidence and was therefore contrary to law.

Although some other questions are made in the record, these are the only questions that are passed here, and the only ones of sufficient importance to consider in the discussion of the case.

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The accident occurred in the western part of the city of Toledo, near Air Line Junction and near the overhead bridge of the Michigan Central Railway Company. Vogelsson was a brakeman on a freight run between Toledo, Ohio, and Elkhart, Indiana, and on the day of his injury, May, 17, 1897, he was starting with his train for Elkhart. In order to help the train start and push it over the grade, it was pushed by a pony engine to a place near the overhead bridge mentioned.

The pony engine is called a "pusher," and when in the judgment of the conductor of the pony engine it was not necessary to go further, the custom was to cut off the engine or "pusher" and the train then proceeded on its way without further assistance.

On this occasion, when the pony engine was cut off from the train, Vogelsson was on top of the caboose, which was immediately in front of the pusher, and he fell off, his claim being that the locomotive was cut off without warning, and so suddenly that the slack of the train was thereby suddenly released and he was thrown, or jerked off the top of the caboose by the jar or jerk that was occasioned by the cutting off of the pusher; and that is one of the acts of negligence complained of, to-wit, that the locomotive was cut off so suddenly as to constitute negligence, thereby jerking him off the top of the caboose; and it is further claimed, that no signal, by whistling or otherwise, was given him of the intention of the engineer to cut off the locomotive, and that was also negligence.

Vogelsson testifies that as he stood on the roof or deck of the caboose, he could see that the locomotive was cut off, or about to be cut off, and he heard the noise of the train as the slack was let out, and knew that there would be a jar or jolt; that to guard himself, he took hold of the iron hand-hold or "grab-iron," which is a round iron, three or four feet long, immediately over the door of the cupola of the caboose; that he took hold of this to protect himself, and he claims that when the jar came, the hand-hold was pulled out at both ends, came off the framework of the caboose, and that he then fell off and was injured in his knee and his back. He jumped up as soon as he struck the ground and climbed up on the caboose and went on his way

to Elkhart, not thinking at that time that he was very seriously injured, his injury not causing him a great deal of pain, although he limped some therefrom.

The railway company denies that the "pusher" was cut off with any more suddenness than usual, or that it was done in a negligent manner, and denies that this hand-hold or grab-iron was out of repair, or improperly fastened to the caboose, and denies that it pulled out as Vogelson claimed that it did. And the railway company claims that the manifest weight of the evidence is in favor of its contention, and that, therefore, the court erred on this branch of the case in not granting a new trial; and the company claims further, as has been stated, that Vogelson afterwards settled with the company and released it from all claims.

Vogelson in his testimony stated his claim as to the facts substantially as I have given them. When he reached Elkhart, he met there George Beck, who was a claim agent of the company, and Beck told him that he wanted a statement of the accident, and Vogelson, in the presence of his brother, E. E. Vogelson, who was at that time living at Elkhart, gave Beck a statement of the accident, which was reduced to writing by Beck and signed by Vogelson.

In this statement, which is attached to the bill of exceptions, he gives his version of the accident and says that when they were near the Michigan Central overhead bridge "the pony engine was uncoupled from the rear end of caboose and the slack went back and I was thrown off the caboose on to the ground. I don't know which pony it was. I consider that I was thrown off caboose on account of the engineer or pony engine shutting off too quick and without warning. It is the custom for the ponys to go as far as depot at Air Line Junction. I was in a position on caboose where I could see that the engineer shut off suddenly, and I made an effort to save myself but could not do so. I lit on my feet, and my back struck a rail, bruising back. Continued with my run on to Elkhart and expect to continue with work without laying off. No physician required."

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He states his residence and the fact that he is married and has children and has been in the service of the company three years. That is signed by him and signed by his brother, E. E. Vogelsson, as a witness. This statement was written on a printed blank, and the printed part of the paper recites that "said injuries were not due to any negligence or carelessness on the part of any boss, foreman, engineer, conductor or yardmaster in the employ of said company," etc.

Another paper, bearing the same date, was also offered in evidence, signed by Vogelsson. This paper purports to release the company from all liability. It is a printed blank. It says in substance, that in consideration of the payment of one dollar and his re-employment by the company, the company is released from all claims arising out of injuries set forth therein. There is at the end of the paper a receipt for one dollar, signed by Vogelsson. Vogelsson claims that he knew nothing of this second paper, that is, the white paper, but admits signing the yellow paper, being the one first above referred to. Beck testifies to Vogelsson's having signed both papers. It was the duty of Vogelsson, when this accident occurred, to state the facts to his conductor, in order that he might report them; and, on their way to Elkhart, he met the conductor on the train and told him what had occurred, that he had been thrown off the train.

According to the testimony of the conductor, he said nothing to him about the hand-hold having been out of repair, he made no mention of that, but did tell either the conductor or the brakeman that he took hold of the hand-hold with his crippled hand—it seems that he had one finger off of one hand—and that if he had taken hold with his "good hand" he could have held on.

This Vogelsson denies. He also talked with the other brakeman, Mr. Felton, on the way to Elkhart, and told him about his being jerked off from the top of the caboose, but said nothing to him about the hand-hold being out of repair or pulling off.

Vogelsson claims that the screws that fastened the hand-hold at each end of the iron pulled out; that when he got back on the top of the caboose he drove them in again with a coupling-

link and left them in that condition. No other witness testifies to this hand-hold being out of repair. The two car inspectors at Toledo, Mr. Phillips and Mr. Kundz, inspected the caboose just before it left Toledo, and they testified that the hand-hold was in good repair. No one is called from the yards at Elkhart to testify that the hand-hold was out of repair. Both the conductor and the other brakeman upon the freight train testify that they used this hand-hold frequently upon this trip and that it was not out of repair.

The hand-hold was immediately over the small door of the cupola of the caboose and was used by the men in getting in and out of the cupola and was necessarily used frequently both by the conductor and the brakemen, in making the trip.

About midway between Toledo and Elkhart, Vogelson exchanged places with the other brakeman, Felton, the latter taking the rear end and Vogelson went to the front, so that Felton was on the caboose the rest of the trip, and he testifies that he saw nothing out of order with the hand-hold.

It would seem impossible for this hand-hold to have been pulled out and the screws pulled out of the wood and then driven back in again by Vogelson in such a way that it would not have been discovered.

Vogelson's claim that this hand-hold pulled out on this occasion rests entirely upon his own uncorroborated testimony. Besides that, as appears from the written statement which he made at Elkhart to Mr. Beck, he said nothing to him at that time, the next day after the accident, about the hand-hold pulling out. Vogelson claims that Beck did not read this statement to him; he admits that he signed it, but says that Beck did not read it to him; he says that he made a statement to Beck telling him the facts about the accident, and Beck took it down in writing, and then he, Vogelson, signed it, but Vogelson does not claim in his testimony that he said anything to Beck about the hand-hold being out of repair.

There is no claim made that the statement of the facts of the accident, as set down by Beck in this paper, was not as given to him by Vogelson on the next day after the accident occurred;

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nor does E. E. Vogelson, the brother, who was present, make any claim of that kind in his testimony.

This caboose, according to the undisputed testimony, was comparatively a new car. The hand-hold was fastened at either end with long screws, nearly three inches in length, which were set into a piece of oak some two inches thick, or thereabouts, going entirely through that and a small distance into the pine of the car, and this oak piece was securely fastened to the side of the car. If the hand-hold had pulled out, as Vogelson claims, it seems almost impossible that he would not have stated this to Mr. Beck, in Elkhart, the next morning after the accident. To have had a hand-hold so insecurely fastened to the side of the car as to pull out in this way, would have been a very serious defect in a car and probably would have been negligence on the part of the company if the defect had existed for any length of time, and when he was called upon to make his statement to the claim agent, being a railroad man of some experience and having had two accidents before this in which he had signed papers, he knew the purpose of asking for this statement; he knew that it was to be sent to the offices of the company to be kept there on file as his version of the accident; he knew the importance of stating all of the facts that would be favorable to him if he contemplated making any claim against the company for damages; but, notwithstanding all this, and notwithstanding, further, that it was his duty as an employee of the railroad company to state all of these facts, he says nothing whatever at this time in regard to the hand-hold being out of repair.

It seems to us that the manifest and clear weight of the evidence is against him upon that proposition. He is contradicted by the conductor and by the brakeman upon this very train; he is contradicted by his own statements made upon the trip upon which he was injured and by his failure to make this statement to Mr. Beck, upon the day after the accident. And the fact that a man does not speak when he would naturally be expected to speak, or when it is his duty to speak, as in making a statement of this kind, tends to impeach his testimony

when he afterwards testifies to facts that were not stated under these circumstances.

The court of common pleas instructed the jury that so far as any claim for want of a signal was concerned before the engine was cut off no evidence of negligence had been offered against the company, for it had not been shown that it was the custom to give a signal before the pony engine was cut off. This ruling we think was correct.

It was claimed that the engineer of the "pusher" was negligent in cutting off as suddenly as he did, Vogelson claiming that he was thereby jerked off of the top of the caboose. He made this claim immediately after the accident and he made it in the statement which he signed before Beck. A large number of witnesses, perhaps nearly all of the witnesses, except Vogelson himself, testify that the locomotive was cut off in the usual way. It is true that sometimes this occasions more of a jar than at other times; it is impossible for an engineer to cut an engine off in exactly the same way every time. It was known that it would cause some jar or jerk to the train and the men expected it and Vogelson knew that this was coming.

Without reviewing the testimony upon that point, it appears to us to be doubtful, at least, whether he ought to recover upon that ground, the weight of the testimony perhaps appearing to be against him upon that proposition; but still he testifies himself positively that there was a very severe jerk at the time the locomotive was cut off, much harder than usual, and that he was unable to stand on top of the roof, and if it was cut off with such a jerk as he testifies to, it would doubtless constitute negligence on the part of the company, and the court properly overruled the motion of the railroad company to direct a verdict for the defendant.

Coming to the other defense: It is claimed that whatever claim Vogelson had against the company was settled and released. On the day following the accident he signed the paper to which I have referred, a printed blank, agreeing upon the face of it to release all claims in consideration of his re-employment and the payment of one dollar. He testified, however, that he had no knowledge of signing such a paper, that he only



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signed one paper, and he is corroborated by the testimony of his brother; and perhaps the weight of the testimony is in favor of Vogelsson as to this claim.

Vogelsson continued with his work after May 17, but his knee grew worse and its condition became very serious, and on October 11, following, he went to the hospital, under the care of the railway company and at their expense, and had an operation performed upon his knee, which had gotten into a very bad condition. He had two or three operations performed upon the knee, water having collected at the knee-joint. After being at the hospital two or three weeks, he went back to his home at Toledo and was around and about and occasionally called at the office of Mr. Brown, the claim agent of the company in the city, and Brown promised to do what he could for him; and finally Brown received a letter from the company saying that they offered to settle with Vogelsson for \$40. Brown testifies that he told Vogelsson this; and that a day or two after that, he received the money from the company and went to Vogelsson's house and met him there, and that Vogelsson agreed to the settlement and agreed to accept forty dollars; that he paid it to him and Vogelsson then signed a receipt, and, a full and complete release of all claims against the railroad company.

The release recites that:

"For the consideration of forty dollars received to my full satisfaction of the Lake Shore & Michigan Southern Railway Company, I hereby release and discharge the said company from all claims and demands against it, and especially from all liability to me for personal injuries of whatever kind, nature or description, received by me at Air Line Junction, Ohio, on May 18, 1897, by being thrown from top of caboose to the ground, injuring my back and right knee; and for said consideration said company is hereby released and discharged from any and all claims and demands in any manner arising from or growing out of said accident; also from part loss of time and wages while I was unable to work on account of said accident. Received payment October 27, 1897.

"FRED VOGELSSON."

This was witnessed by Ross Buckmaster and Geo. B. Brown, agent of the company. Mr. Vogelsson claims that at the time he

signed that paper he was not in a condition mentally to understand what he was doing. He admits that Mr. Brown came to the house and he remembers receiving \$40. Further than that, he says his recollection is not distinct and he supposed that whatever he did sign was simply a receipt for the \$40 paid him by the railway company; that he expected more and that he had no intention to sign a release in full.

No witness other than himself testifies that Vogelson was at this time insane or in such a mental condition that he was unable to understand what he was doing, in the ordinary affairs of life. Dr. Bowman, who was his physician at that time, testifies that his understanding was not very acute at that time; that he had suffered a great deal from his injuries and that physical suffering always affects the mind; that he was in need of money, and that, in his judgment, he would have been willing to sign almost any paper in order to get money to help him, but he does not testify that Vogelson was mentally unsound or incapable of understanding such a paper.

Mr. Brown testifies, as to all the facts and circumstances surrounding the transaction, that he was entirely friendly with Vogelson; that Vogelson met him at the door, resting upon one crutch; that he talked the matter over with him and paid him the money; that he called young Buckmaster, his brother-in-law, to witness the paper, and that the paper was read over to Vogelson.

Vogelson went back to his work on the following February and he continued to work for the company during that year, off and on, his limb troubling him at times. And during the year 1899 he continued to work for the company, sometimes on one job and sometimes on another. He made no complaint during all that time that any advantage had been taken of him in the signing of this receipt, but he stated, according to the testimony of Mr. Bennet, the conductor of the freight train, that he had settled with the company; and made the same statement to Mr. Felton, the other brakeman, and substantially the same to Mr. Whiting, who was a clerk for the company.

These men, especially the conductor and brakeman, were friendly to Mr. Vogelson, and Bennet and Felton were fellow

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trainmen with him. It does not appear that they were seeking to take any advantage of him. They say that he voluntarily told them what had occurred; that he had settled with the company.

We are of the opinion that the evidence in this case shows that Mr. Vogelsson did, on October 27, 1897, voluntarily settle his claim, whatever he had, against the railway company. We are unable to believe that he at that time was in such a condition that he did not understand what he was doing. He had been working for the company up to about October 11, when he became worse and went to the hospital. He seemed to comprehend what occurred at the hospital and the operations that were performed. He was apparently able to leave the hospital when he was discharged from it, at least, he came home again and was up and about the house. He called at the office of Mr. Brown, in Toledo, and talked with him about his case occasionally, and no witness, except Vogelsson himself, testifies to anything which would indicate mental unsoundness on his part or inability to understand fully what occurred at the time this paper was signed. We think that the evidence that he settled at that time and that he fully understood that he was settling, is full and convincing.

He remained with the company after that time for a period of over two years, without any complaint. In considering this branch of the case we must also consider the fact that the claim that he had against the company, and which he must have known, was at best, a very doubtful claim. We are of the opinion that his claim that the hand-hold was pulled out, was not sustained by the evidence; that his statement as to that is not true, and that his claim that the locomotive was cut off in such a manner as constituted negligence, is very doubtful. Now, having a claim of this kind, he was doubtless willing to make such a settlement as he could with the railway company.

His request, after his knee became worse, was, not that the railway company should pay him any substantial sum for damages, but that they give him some employment easier and lighter than he had before, or that they permit him to go to the hospital at their expense in order that he might have an operation performed. These two requests were granted. His request after

the operation had been performed was that he might have employment in his injured condition, and he was given jobs that he could do. During all that year of 1898 and 1899 he was working from time to time for the company in different capacities and without any complaint that advantage had been taken of him, until about the last of December, 1899, when he quit the employment of the company, and on January 2, 1901, a little less than four years after his injury, he began this action.

His injury turned out to be quite serious; his knee was so hurt that it has never fully recovered; he is still lame and the injury probably is permanent. The amount of the verdict was small, \$500, and indicates a compromise on the part of the jury. Had he been entitled to recover against the company, by reason of negligence, for the injuries which the evidence shows he sustained, and the condition he is now in, he would have been entitled to a much larger sum than \$500.

I only speak of this to show that the jury that heard the case, some of them at least, must have been very doubtful of the plaintiff's claim. We can only decide this case according to the evidence and according to law, and while we may sympathize with Mr. Vogelson in his condition, the only question here is, whether his injuries are due to the negligence of the company, and whether he has settled and released any claim that he may have had against the company; and after a very careful examination of the record, we have reached the conclusion that the verdict is not sustained by sufficient evidence; that the finding of the jury that he did not settle with the company and release it is manifestly against the weight of the evidence, and that the court for this reason erred in overruling the motion for a new trial. We find no other error in the record.

For these reasons the judgment of the court of common pleas will be reversed and the case remanded.

*E. D. Potter*, for plaintiff in error.

*Harvey Scribner* and *W. A. Owen*, for defendant in error.

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**PROSECUTION FOR NUISANCE.**

[Circuit Court of Cuyahoga County.]

**E. C. TERRY v. STATE.**

Decided, June, 1902.

*Nuisance—Manager of a Business from Which Nuisance Emanates May be Prosecuted Therefor—Creating and Maintaining a Nuisance—Not Affected by Section 6920, Relating to Continuance of Nuisance—Evidence as to Nuisance Existing Prior to the Time Charged—Motion to Strike Evidence from Stenographer's Notes—Right of and Demand for Trial by Jury.*

1. It is not error to deny a trial by jury to one accused of maintaining a common nuisance.
2. Where such nuisance results from the carrying on of a business, the manager of the business will be prosecuted therefor notwithstanding he has no ownership therein.
3. Section 6921, relating to the continuation of a nuisance after the prosecution therefor has been begun does not apply to a prosecution for creating and maintaining a nuisance, when the offense charged is not an additional offense.
4. Evidence in support of such a prosecution is inadmissible where it relates to the existence of the nuisance at times other than that charged in the information; but it is not prejudicial error to refuse to strike out the testimony of a witness who stated that she had been sick and that the odors complained of were the cause of her sickness, where from other and competent evidence the court might well have come to the conclusion reached below.
5. Where a trial is to the court without a jury, it will be presumed that no evidence was considered that was not competent, and a motion therefor will not lie to strike evidence from the notes of the stenographer.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on error.

The plaintiff in error was put upon trial and was convicted in the police court upon an information charging him with maintaining a common nuisance in the city of Cleveland from April 9, 1900, continuously to and including April 14, 1900, by carrying on the business in a certain building in said city, of heating and drying damp, wet and sour malt, thereby producing noisome and offensive smells, which were injurious to the health

and comfort of residents of the neighborhood in which such business was conducted.

On behalf of the plaintiff in error it is urged that there was error on the part of the trial court in that the demand of the accused for a trial by jury was denied.

The record shows that before any such demand was made the accused objected to the introduction of any evidence, and that such objection was overruled. Then followed the demand for a trial by jury. Though it was urged on the part of the state that this demand came too late because it was preceded by an objection to the introduction of any evidence, we are not prepared to hold that the demand was not made in time, but we do hold that there was no error in refusing a jury trial.

The constitutional provision that "the right of trial by jury shall remain inviolate," has been repeatedly held not to enlarge or modify the right of trial by jury as it existed prior to the adoption of the Constitution.

In the case of *Inwood v. State*, 42 Ohio St., 186, there is a very full discussion in an opinion by Judge McIlvaine of the question now being considered, and, under the authority of that case and the cases there cited, we hold that the rights of the accused were not violated by the refusal to give him a jury trial.

It is further urged that the evidence wholly failed to establish the charge: (1) Because it is said that the accused was not the proprietor of, nor had he any interest in, the business which was being carried on at the place charged, and which is said to have caused the nuisance complained of. On this subject Terry himself testified that the business was being carried on by the Cleveland Grain Drying Company; that he had no interest in the business, but that he was an employe. On cross-examination, after he had testified that he was an employe, he was asked this question: "In what capacity?" To which he answered, "Tending to the business of the mill there."

Question. "Manager or superintendent?" Answer. "I have no superintendency; I merely receive so much salary a week."

Question. "Manager?" Answer. "Yes, I suppose so."

From this and the other evidence in the case, it is clear that

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the accused was the party who managed the business for the proprietor, and if, in so managing the business the nuisance was created, we hold that he could not escape by reason of his having no ownership in the business.

Section 6921, Revised Statutes, provides that:

“Whoever erects, continues, uses or maintains any building, structure or place for the exercise of any trade, employment or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort or property of individuals or the public \* \* \* shall be fined not more than five hundred dollars.”

To hold that where a business is so conducted as to make the proprietors of such business *guilty* under this statute, that the man who manages the business has charge of it and directs how it shall be carried on, is *not guilty*, would be to hold that one may create and maintain a nuisance without responsibility on his part, provided only that in so doing he is only the employe of somebody else. This does not accord with our understanding of the law.

It is further urged, however, that the evidence did not justify the finding, because it is said that to do so, it must have been shown that the nuisance continued for a period of not less than five days. Section 6920, Revised Statutes, on this same subject provides that:

“The continuance of any nuisance for five days after prosecution commenced therefor shall be deemed an additional offense.”

A claim seems to be made on the part of the plaintiff in error that this prosecution is affected by this last mentioned section; but we find nothing in the record to show that there had been a prior prosecution, nor that this was charged as “an additional offense.” Nor do we find from the reading of the statute, or from any authority to which our attention has been called or which has come under our notice, that a continuance for five days of such nuisance is necessary in order to warrant a con-

viction, and the claim of the plaintiff in error in this regard is not well taken.

It is further urged that the evidence fails to show that the business of which the accused was the manager produced "noisome and offensive smells" to the prejudice of the neighborhood or the public. The evidence in this regard is conflicting. Many of the witnesses testify that on some of the days between the ninth and fourteenth of April, 1900, the stench from this establishment was exceedingly offensive, and that it affected the atmosphere for a long distance from the place of business; and some of the witnesses testify that during this entire period charged in the information the smells coming from this establishment were in the highest degree offensive. True, others testify that the odors were much less offensive than the witnesses introduced on the part of the prosecution described them to be, but this was a matter for the trial court to determine under all the evidence, and we are not surprised at the conclusion reached, and can not disturb the finding in this regard.

Complaint is further made upon the exclusion by the trial court of evidence offered by the accused. This consists chiefly in the exclusion of evidence as to the existence of these offensive odors at times other than that charged in the information. We find no error in the exclusion of such evidence, nor in any of the rulings of the court upon questions of evidence, which would justify a reversal of the judgment.

As to the exclusion of evidence of the condition at times other than as charged in the information, counsel for the accused stated that he expected to prove that the conditions were exactly the same at such times as they were between the ninth and the fourteenth of April, but that would only be to show in a round-about way what could as well be shown, if there were witnesses who knew, that the conditions were such between the ninth and fourteenth of April as that the offensive odors could not have been, or, in any event, were not produced.

Perhaps the rulings of the court during the testimony of Mary Phinnin, a witness on the part of the prosecution, are as objectionable to the plaintiff in error as any which were made during the trial. This witness testified that she had been sick



about the time that the offense is charged to have been committed. She was then asked by the prosecuting attorney this question:

“Were you sick between the ninth day of April this year and the fourteenth day of April?” (This being the time charged in the information).

This question was objected to by the accused; the objection was overruled, and the witness answered, “Yes.” Then this question was asked:

“What kind of sickness did you have?”

This was objected to, the objection overruled, and an exception taken by the accused, and the witness answered:

“Sick at the stomach on account of the stink that comes from the mill—stomach trouble.”

A motion was made to strike out this last answer. This motion is a little indefinite, because to merely strike out from the stenographer's notes testimony which has already gone to the trial court or the jury would not result in taking such testimony from the court or the jury. The law does not contemplate that either court or jury read what is written by the stenographer before passing upon the case. But this is a common form and, of course, *meant* that the court should not consider this evidence. The trial being to the court, it is to be presumed that no evidence was considered which was not competent. We are not prepared to say that it was not competent to show that this witness was sick (she lived in the immediate neighborhood of the establishment of which the accused was the manager) during the period covered in the information. We are not, however, prepared to say that it was competent for her to give the cause of such sickness, but we think no prejudice could have resulted to the accused by the failure of the court to grant the motion to eliminate the answer. From the evidence, which was clearly competent, the court might well have come to the conclusion at which it arrived in the case.

The judgment of the court of common pleas is affirmed.

*J. O. Winship*, for plaintiff in error.

*Police Prosecutor*, for defendant in error.

**DOWER.**

[Circuit Court of Hamilton County.]

**WILLIAM GILDEHAUS ET AL V. FIDELITY BUILDING & SAVINGS  
CO. ET AL.**

Decided, December 24, 1902.

*Dower Interest—May Be Subjected to Payment of Debt, Though Un-  
assigned—Findings of Fact not Subject to Review, When—Section  
5464.*

1. The dower interest of a judgment debtor may, under Section 5464, be subjected to the payment of his debts, although not yet assigned.
2. Findings of fact and conclusions of law not made a part of the record by journal entry can not be considered on review.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

· Heard on error.

The answer and cross-petition and supplemental answer and cross-petition of Henry Frese set up two judgments in favor of Frese and a right to subject the dower interest of the judgment debtor to the payment thereof. While it is true that he alleges in the supplemental answer and cross-petition that a levy had been made upon the dower interest, and the same sold in another action, yet he does not ask or seek to confirm that sale, but prays that the dower interest may be subjected to the payment of his debt under Section 5464, Revised Statutes. This may be done, although the dower has not yet been assigned. *Boltz v. Stolz*, 41 Ohio St., 540.

The other questions presented can be determined only by the facts in the case. The court at the request of plaintiff in error made separate findings of fact and conclusions of law, but the same were not made a part of the record by journal entry or otherwise, and hence can not be considered.

Judgment affirmed.

*Henry J. Harrop*, for plaintiff in error.

*John Coffey, J. M. Dawson and E. M. Garrison*, contra.

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**THE OHIO RULE AS TO CONTRIBUTORY NEGLIGENCE.**

[Circuit Court of Ashtabula County.]

L. S. & M. S. RAILWAY CO. v. ALBERT E. HARRIS, AS ADM'R OF  
CORA E. HARRIS.

Decided, October 18, 1901.

*Negligence—Contributory Negligence Defeats Recovery—Notwithstanding Negligence of Defendant.*

1. Failure by the exercise of ordinary care to discover the peril of one who was thereby injured, or failure to use ordinary precautions for preventing the accident, do not create liability, where the one injured was himself guilty of negligence in placing himself in the perilous position.
2. Where one approaches a railroad track at a point where a train could be seen for a great distance, and without looking steps upon the track and is struck by a train and killed, there is no liability on the part of the railroad company, notwithstanding the failure of the engineer to give the statutory signals. *Railway Company v. Schade*, 15 C. C., 424, not followed.

LAUBIE, J.; BURBOWS, J., and COOK, J., concur.

This is a proceeding to reverse a judgment of the court of common pleas rendered in favor of defendant in error for the claimed wrongful killing of the decedent by the plaintiff in error.

It appears from the evidence in the case that the decedent, Cora E. Harris, went to the depot of the company at Geneva for the purpose of taking east-bound train, No. 28. On arriving there before the train was due, she passed over the tracks and grounds of the company to the Knapp & Pratt Manufacturing Company's plant, located north of the tracks, to see her husband, the present administrator, the depot being on the south. There were two main tracks, the west-bound track being the one next to the depot, as the trains of that road run on the left-hand track. Adjoining that on the north and in close proximity was the east-bound track; adjoining that and in close proximity was a side-track, and then about forty feet north of that was one or more other side-tracks. It seems

that there was a way or footpath there, used by the company's employes in going from the passenger station across to the north side of these tracks to the freight depot. It was also in evidence that there was a path used by the public and by the employes of this manufacturing company without objection on part of the railway company, that ran from a point opposite the center of the station platform to that company's plant in a slightly northeasterly direction, but not visible across the railway tracks. Mrs. Harris came back on this latter path from the Knapp & Pratt Manufacturing plant toward the passenger station and was struck by train No. 23, which was running west over the south track, and was thrown onto the station platform, dead. This was a fast train that did not stop at Geneva.

It seems there was a street called "North Broadway," which intersected the tracks east of the passenger station. The distance from the passenger station to North Broadway was definitely fixed by the husband of the decedent, the plaintiff administrator, who testified that he counted the rails from North Broadway to the passenger depot, and there were seventeen rails; and it was shown that the rails were thirty feet in length. So the distance was over five hundred feet instead of two hundred and fifty, as alleged in the petition.

Exception was taken to the charge of the court in regard to this crossing, which charge is as follows:

"It is claimed that the decedent's death was caused by the negligence of the defendant.

"First, by running of train No. 23, at a high and dangerous rate of speed near to the depot and over a crossing used by the public in crossing its tracks to certain buildings or shops located upon the opposite side of said depot, and its failure to give notice or warning by sounding its whistle at not less than eighty or more than a hundred rods before reaching North Broadway, a public highway, located east of the depot, and in not ringing its bell until it had passed over said North Broadway crossing. \* \* \*

"And we say to you, gentlemen, as a matter of law, it was the duty of the railway company to sound its whistle not less than eighty nor more than one hundred rods before reaching

the crossing at North Broadway, and to ring or cause to be rung the bell from said engine until said street was crossed."

So that the court gave to the jury, as one of the issues in the case, that if the whistle was not blown a statutory distance before the train reached Broadway crossing, and the bell rung, then the plaintiff might recover. What had that to do with the decedent crossing the tracks of the company beyond, and five hundred feet distant from such street? She was not upon that crossing, nor near to it, nor upon that street. What duty did the company on this occasion owe to her in regard to Broadway crossing? The failure to give such signals had no possible connection with her injury, and could not have, as she was not upon or near to that highway. It was only to persons on such highway that such duty was due, and the court submitted to the jury an issue that ought not to have been submitted to it; and for aught we know the jury based its verdict solely upon that very proposition, because there was evidence that such signals were not given for North Broadway; and in this respect the court, as we think, erred.

Another exception was taken by the defendants below to the court's giving to the jury, at the request of the plaintiff's counsel, the following instruction:

"If the decedent in this case was negligent in going upon the track in the manner and at the time she did, yet if the engineer in charge of the train, ought, by the exercise of ordinary care, to have seen the decedent in her perilous position and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to have avoided the collision, and failed so to do, it would be negligent for which the company is liable, notwithstanding the negligence of the decedent in going upon the track."

In the general charge the court instructed the jury along the same lines, but not so clearly and unequivocally as in this request. The meaning and effect of this request clearly was that the plaintiff might recover although the decedent had been guilty of the same degree and kind of negligence as the engineer—failure to see her peril and avoid the collision, which

she might have done, and could have done, in the exercise of ordinary care.

Now, this is opposed to all our ideas of contributory negligence and its effect. It is opposed to the settled law of the state—settled by many decisions of the court of last resort, unless those decisions have been set aside and reversed by the case referred to and relied upon by counsel for defendant in error (*Railway Co. v. Schade*, 57 Ohio St., 650). Up to that time it certainly was the law of this state that a person approaching a known railroad crossing was obliged to use his senses of sight and hearing to ascertain whether there was a train approaching which might cause him injury in case he got upon the track of the railway company and that if he did not, without a reasonable excuse therefor, and was injured upon the track, he could not recover, unless, indeed, it was alleged and proved that the engineer actually saw such person in his perilous position in time to have stopped the train, in the exercise of ordinary care, and have prevented the injury.

The case of *Railway Co. v. Schade*, *supra*, was taken on error to the Supreme Court from the circuit court of the eighth circuit and affirmed. The case as reported by the circuit court 15 C. C., 424, contains the charge of the trial court upon the question (from which the charge in the case at bar was copied), and is as follows:

“4. If the decedent in this case was negligent in going upon the track in the manner and at the time he did, yet if the engineer in charge of the train ought by the exercise of ordinary care, to have seen the plaintiff in his perilous position, and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid the collision, and failed to do so, it was negligence for which the company is liable, notwithstanding the negligence of the decedent in going upon the track.”

This charge having been upheld as good law by the circuit court, the case was taken to and affirmed by the Supreme Court in *Railway Co. v. Schade*, 57 Ohio St., 650, as I have stated, but without report.

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On what ground it was affirmed the Supreme Court has left us in doubt. Was it because there was no legal bill of exceptions, or because no exception was taken to the charge, or because from the undisputed evidence the plaintiff was entitled to recover anyhow, and therefore the charge was not prejudicial? The court has given us no light upon the question. Can it be assumed as a fact that the Supreme Court would thus undertake to reverse the numerous former decisions of that court, and the settled law of the state, without a word of explanation? Certainly not. If the court intended to do so, it would have discussed the matter and stated the reasons for such reversal. But we are not left in this position of doubt. If the Supreme Court did undertake in the case just referred to, to reverse and upset the former rulings of that court upon this question (which I do not believe it did), the case of *Lake Shore & M. S. Railway Co. v. Ehlert, Admr.*, 63 Ohio St., 320, shows that the court has returned to its original holdings. That case also went up from Cuyahoga County Circuit Court, reported in 19 C. C., 177. In that case Christian Holtz, the decedent, was killed upon the crossing of the Big Four Railway at Barton street, in the city of Cleveland, over which the Lake Shore ran trains. There were gates and a flagman at the crossing. There was no arm of the gates over the sidewalk, but over the street the gates were down. Holtz approached on the sidewalk and placed himself near to the first or south track where he stopped and stood watching and awaiting the passage of a train on the second or north track, when a train approached from the opposite direction on such first track, which he did not see or hear, and he was struck by it and killed. Now the same claim was made by counsel for plaintiff in that case and the same charge, substantially, given in regard to it as in *Railway Co. v. Schade, supra*, and we have it (19 C. C., 182), in the opinion rendered by Caldwell, J., as follows:

“Further, I say to you, gentlemen, that although the decedent may have been guilty of negligence in putting himself in a dangerous position, a position in which he was liable to be injured by the passing of the trains, yet if the employes of the

railroad company in charge of said passenger train knew of his danger, or might have known of his danger, by the exercise of ordinary care, and, by the exercise of ordinary care thereafter, controlled and stopped and managed the train in such a manner as to save the decedent from the injury and from death, it was their duty to do it; but, if they failed to do it, under such circumstances, that failure would be the approximate cause of the death, and not negligence in getting into or going into a place of danger.”

In affirming this charge, Judge Caldwell said:

“I have already said that Christian Holtz was to blame in part for his own death. He was guilty of contributory negligence.

“Now, here is the proposition in law given by the court to the jury, saying to them that notwithstanding a party may contribute to his own injury, yet if his negligence can be seen and known by the defendant in time to protect him or save his life, and it fails to do it, then such negligence of the defendant is the proximate cause, and that of the plaintiff is the remote cause, and the party may recover. \* \* \*

“This is a proposition that has undergone a vast amount of discussion by the courts. A large number of states hold it to be the law. The United States court holds it to be the law, and as we understand it, this state holds it to be the law.

“In *Railway Co. v. Kassen*, 49 Ohio St., 230, there was much discussion as to whether that case settled this principle of law or not. But a case went from this county to the Supreme Court that involved the question fairly and squarely, and the Supreme Court affirmed the opinion of this court, or affirmed the case wherein this court had allowed a charge of that nature to stand. *L. S. & M. S. R. R. Co. v. Schade*, 15 C. C., 424; affirmed by Supreme Court without report, 57 O. S., 650.

“We think that has settled the law of Ohio, and that this is a proper charge if the facts warrant it.”

So the learned judge in thus announcing the majority opinion of the court, stated that it had now become the settled law of the state that in such a case plaintiff might recover, although he was guilty of precisely the same grade of negligence as the servants of the defendant.

We can not think so. Let us consider the effect of such a proposition for a moment.



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Two persons walking very rapidly upon a sidewalk come in collision and both are injured. If each could have seen the other in time to have avoided the collision, then each would be equally guilty of negligence; can each recover in such a case, or which one may recover? Where a party with a team and loaded wagon undertakes to cross the track of a known railroad, and a train comes along and strikes the wagon, as in the case of *Railway Co. v. Schade, supra*, and kills driver and horses, and the train be thrown off the track, when the driver of the team and of the engine could each have avoided the collision by looking out for the danger, but neither did; or, where at a crossing of two railroads, trains of the respective roads come in collision, which might have been avoided had either engineer looked along the other's track, which party can recover of the other? Such cases have occurred. May each recover of the other, or is it the one that first sues that can recover? Or, is it to be contended that the rule applies only where but one of the parties is injured? These questions are substantially answered by the Supreme Court in disposing of *Lake Shore & Michigan Southern Railway Co. v. Ehlert*, 63 Ohio St., 320, and this is the syllabus:

"1. When the gates across a highway at a railroad crossing are closed, they definitely warn the public that the crossing, whether it is of a single or a double track, is, for the time being, to be used for the passage of trains.

"2. One who, with the knowledge of such warning, passes a closed gate and takes a position upon the crossing is guilty of negligence which will prevent a recovery for injuries he may receive from a passing train."

And the case was reversed, but why? If the doctrine given to the jury, and affirmed by the circuit court was correct—if such doctrine had become the settled law of the state by the affirmance of *Railway Company v. Schade, supra*—then why did not the Supreme Court affirm, instead of reversing this case of *Railway Co. v. Ehlert, Admr.*? The jury under the evidence must have founded its verdict directly upon the proposition given to it by the trial judge, that although the decedent was negligent in the respects claimed, yet if the engineer

could have seen him and saved him from injury, by the exercise of ordinary care, the plaintiff would be entitled to recover. The Supreme Court in reversing the case held otherwise, and returned to, if it ever did abandon, the doctrine of the effect of contributory negligence in defeating recovery, where either party might have avoided the injury by the exercise of ordinary care. True the Supreme Court in reversing this case, did not refer to, notice, or expressly disapprove of the charge of the trial court and the assumption of its legality by the circuit court by reason of the affirmance of *Railway Co. v. Schade*, *supra*; but to place the matter beyond question, the doctrine that "ordinary care requires that a person in the full enjoyment of the faculties of sight and hearing, before attempting to pass over a railroad track, should use them for the purpose of discovering and avoiding danger from an approaching train; and an omission to do so, without reasonable excuse therefor, is negligence which will defeat an action by such person to recover damages for an injury to which such negligence contributed," as held in *Railway Co. v. Crawford*, 24 Ohio St., 631; *Railway Co. v. Elliott*, 28 Ohio St., 340; and *Railway Co. v. Rothgeb*, 32 Ohio St., 66, was expressly upheld, affirmed and applied in the case of *Wabash Ry. Co. v. Skiles*, 64 Ohio St., 458.

The case of *C., H. & D. Co. v. Kassen*, 49 Ohio St., 230, has no bearing upon the question, as the holding in that case was predicated upon the fact that the servants of the company had actual notice, or that which amounted to the same thing, of the perilous position of the deceased in time to have saved him, and yet made no effort to do so.

We therefore hold that the court in this case erred in its instructions to the jury on this point.

It is also claimed that the verdict in this case is contrary to the evidence, and as may be inferred from what I have said, we find that claim to be correct. I have stated some of the facts, but not all by any means bearing upon this question. It was shown upon the part of the defendant below, that from the tracks, and especially as far north as the third track north of the station platform, one could see along the

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track on which this train was coming for a great distance—that any one looking to the east could see the train approaching for some miles. What did the decedent do? The evidence is, that she looked neither to the east nor the west; that she was running until she approached near to the south track on which this train was approaching from the east, when she dropped into a walk and was struck evidently when near the south rail, as she was thrown to the south onto the station platform. The evidence further shows that people on the platform were yelling to her to stop; men were waving their hats at her, and some one looking out of the telegraph office, in the excitement of the moment, as an expression of the situation, exclaimed, "My God, that women is going to try to cross." Everybody saw the train coming. Everybody heard it. Did she? If she did not, it was her own fault.

The warnings were sufficient in every way, and the train that she wanted to take (No. 28), was still a mile or more to the west, and did not arrive for several minutes after this accident, so that it was not necessary that this unfortunate woman should have rushed into this danger for the purpose of making sure that she should make her train.

These facts make it plain that there could be no recovery in this case; that there was no disputed questions of fact to submit to the jury, and for the errors stated, the case will have to be reversed and remanded.

*T. E. Hoyt and A. J. Trunkey*, for plaintiff in error.

*Theodore Hall*, for defendant.

**ACCOUNTS OF EXECUTORS.**

[Circuit Court of Hamilton County.]

**ESTATE OF BRIDGET GLENN, DECEASED.**

Decided, April 2, 1902.

*Widow—First Year's Support of—Bar of the Statute as to—Presumption in Case of Failure to File Claim—First Years Support for Children—Agreed Statement of Facts Not Made Part of the Record.*

1. The first year's support of widow falls within Section 6113, Revised Statutes, limiting the time for bringing an action against the estate to two years from the appointment of the personal representative; but this limitation runs as to an account against the estate paid by the executrix, from the date of the allowance and confirmation of her account as executrix.
2. Failure by a widow acting as executrix of her husband's estate to file a claim against his estate raises the presumption that she intended the amount of the claim should inure to the benefit of her children.
3. The provision under Section 6040 for the allowance of a year's support for children under fifteen years of age applies to the estate of their deceased mother as well as that of their deceased father.
4. Where the judgment entry indicates that the case was submitted to the court below upon an agreed statement of facts, the failure to enter such agreed statement of facts formally on record or to file a bill of exceptions, does not deprive a reviewing court of jurisdiction to review the findings of the trial judge.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

Heard on error.

This case was heard in the probate court upon exceptions to the inventory filed, and was submitted upon an agreed statement of facts, the substance of which is as follows:

Martin S. Glenn died in April, 1898, leaving Bridget Glenn, his widow, and three children, aged eleven, eight and six years, respectively. By his last will and testament he gave all his property, real and personal, to his widow for life, with remainder to his children. Bridget Glenn was duly appointed and qualified as executrix, and on the — day of May, 1898,

published notice of her appointment. On July 13, 1898, she filed an inventory, wherein the appraisers set off the sum of \$500 in money, and merchandise of the value of \$—, no part of said sum of \$500 having been paid. On January 30, 1900, the executrix filed her account in the probate court, which was allowed and confirmed February 28, 1900. The account contained no charge against the executrix, although she had collected accounts to the amount of \$166.77, but it showed a credit of debts and expenses of administration paid in the sum of \$264.15.

On May 14, 1898, she collected \$2,000 life insurance, from which fund and from her own money she paid debts of the estate of Martin S. Glenn, other than those mentioned in her account filed January 30, 1900, in the sum of \$1,143.62, and was not herself indebted to any one. On July 1, 1900, and subsequently thereto, she became indebted to sundry parties in the sum of \$1,578.23.

Bridget Glenn died intestate January 14, 1901, leaving Mary and Laura, her children. The inventory of her estate shows assets in the sum of \$2,008.13, of which \$600 was set off for the support of the children. The exceptions filed by the creditors are to the allowance of \$600 to the children, to the omission from the inventory of the sum of \$264.15 paid by Bridget Glenn for the estate of Martin S. Glenn, as shown by her account as executrix, filed January 30, 1900, and the further sum of \$1,143.62, paid for the estate of Martin S. Glenn, and also to the omission of the claim of \$500 set off to her for twelve months' support.

The exceptions were sustained by the probate court, and that judgment affirmed by the common pleas court.

The exception to the allowance of \$600 to the children is disposed of by the case of *Hinton's Estate, In re*, 64 Ohio St., 485, and should have been overruled. (See also Section 6040, Revised Statutes, providing for allowance of year's support to children under fifteen years).

As to the claim that the sum of \$1,143.62 paid to Bridget Glenn for the estate of Martin S. Glenn is a debt of the latter, the burden of proof is upon the creditors excepting to the in-

ventory. The only evidence in support of it is the payment itself, while on the other hand, the failure of Bridget Glenn to file any account of such claim, or institute proceedings for its allowance and collection, raises a strong presumption that she did not intend to charge it against her husband's estate, but that it should inure to their children. We think, therefore, that the court erred in sustaining the exception to this claim.

The exception as to the omission from the inventory of the sum of \$264.15, we think, therefore, was properly sustained, because in the account filed January 30, 1900, there appears this statement: "Paid by Bridget Glenn, widow," thereby showing an intention to charge the same against the estate of her husband.

It is urged, however, that the claim was barred by the statute of limitations of two years provided by Section 6113, Revised Statutes; but we think that the limitation began to run only from the allowance and confirmation of the account by the probate court on February 28, 1900.

The debt owing to Bridget Glenn as an allowance from the estate of Martin S. Glenn for her support being a preferred claim, the presumption is that she applied the book accounts collected in part payment thereof. The residue of the claim is barred under Section 6113, Revised Statutes.

It is contended finally that, there being no bill of exceptions, and the agreed statement of facts not being formally made part of the record, this court can not consider it. The facts being agreed upon by the parties, no bill of exceptions was required, and the judgment entry showing that the case was submitted upon the agreed statement of facts, there would seem to be no necessity for a further entry to make such statement a part of the record. *Ish v. Crane*, 13 Ohio St., 574; *Brown v. Mott*, 22 Ohio St., 149; *McGonnigle v. Arthur*, 27 Ohio St., 251.

Judgment of the common pleas and probate courts reversed and cause remanded.

*Jacob Krummel and John J. Gasser*, for plaintiff in error.  
*Closs & Luebbert*, contra.

**TRIAL UNDER THE LOCAL OPTION LAW.**

[Circuit Court of Geauga County.]

JOHN STICK V. STATE OF OHIO.

Decided, February Term, 1902.

*Local Option—Election thereunder—Form of Ballot—Trial for Sales of Liquor—Prosecution may be Required to Elect—Burden of Proof upon the State as to All Essential Facts.*

1. In an election under the local option law no more formalities should be required than are actually necessary, and any form of ballot which has written or printed upon it the words "For the sale" or "Against the sale," is sufficient.
2. In a trial under an indictment for selling intoxicating liquor in a township where such sale is prohibited and unlawful, each sale is a distinct offense, and where there is but one count charging several different sales, the accused has the right before introducing his evidence to require the state to elect upon which sale reliance is had for conviction.
3. A charge to the jury which proceeds upon the theory that the burden of proof shifts as to any essential fact during the trial is erroneous; the obligation to convince the jury of the guilt of the accused beyond a reasonable doubt as to all essential facts continues throughout the trial.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Heard on error.

John Stick was convicted of selling intoxicating liquor as a beverage in a local option township in this county; a motion for a new trial was overruled and judgment entered upon the verdict; and the case is now before this court to reverse the judgment. Three grounds are urged by counsel for reversing the judgment:

First, that no valid election was held prohibiting the selling of intoxicating liquors in the township.

Second, that the court should have required the prosecuting attorney, at the conclusion of the evidence by the state, to elect upon which sale he relied for conviction; and

Third, that the court erred in its charge to the jury as to whom the burden was upon to show that a valid election had been held.

As to the question whether or not a valid election had been held, the only objection made is that the ballots were not in conformity to the statute. It is conceded that all the formalities of the Australian ballot law were conformed to except as to the form of the ballots.

The evidence shows conclusively that the ballots used were slips of paper upon one set of which were printed the words, "For the sale" and on the other "Against the sale." The slips were one inch in width and only of sufficient length to permit being folded. There was no circle at the top or blank space at the side of the ballot. The ballots were not attached to stubs, nor designated "Official ballots." Indeed, there were no marks upon them whatever except the words expressing the judgment of the voter as to the sale of intoxicating liquor in the township; and therefore they were not in conformity to either Sections 2948 or 2966-32, Revised Statutes.

Is it necessary that the ballot should conform to one or the other of these sections? We think not. We do not think that these sections as to the form of the ballots apply to elections of this character. It is true Section 4365-24, Revised Statutes, provides that: "Notice shall be given and the election conducted in all respects as provided by law for the election of township trustees;" but Section 4364-25, Revised Statutes, makes provision for what shall be upon the ballots and contemplates two forms of ballots, one for and the other against the sale of intoxicating liquors, while Sections 2948 and 2966-32, Revised Statutes, provide for one ballot requiring the elector to make a mark before the name of the candidate for whom he desires to vote; and in like manner we have no doubt as to a question submitted to be voted upon, where one is submitted at the same election. Elections to determine whether or not intoxicating liquors shall be sold in the township must, under Section 4364-24, Revised Statutes, be special elections. The object was to take the elections as far as possible out of politics and divest them of every other consideration but the one directly voted upon. No more formalities should be required than actually necessary under the law, and we think that any form of ballot



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that has written or printed upon it "For the sale" or "Against the sale" would be sufficient.

Second. During the trial the evidence tended to show a number of sales made to different parties upon the same evening. A man by the name of Berry made several purchases; also a man by the name of Laughlin, while a number were sitting at the table drinking. The indictment charges that sales were made to Berry and Laughlin and to other persons to the grand jury unknown. At the close of the testimony for the state, the attorneys for the accused moved the court to require the prosecuting attorney to elect upon which sale he relied for conviction; this the court refused to do, and exception was taken.

This ruling we think was error. The indictment charges the defendant with selling intoxicating liquor in a township where such sale was prohibited and unlawful, and not with keeping a place where such liquors were kept for sale; therefore, each sale would be a distinct offense, and the accused could have been convicted upon proof of any one sale. There is but one count in the indictment, consequently but one offense could be properly charged. Each sale being a separate offense, the evidence of the state should have been restricted to one sale, and the accused had a right to know before introducing his evidence the distinct sale he was required to meet. Furthermore, it was important that the record should show what sale he was tried for making in violation of the law, so that if acquitted or convicted, it might be plead in bar of another action. *Stockwell v. State*, 27 Ohio St., 563; *Bainbridge v. State*, 30 Ohio St., 264.

The case of *State v. Bailey*, 50 Ohio St., 636, in no way conflicts with this holding. In that case there were two counts in the indictment framed for the express purpose of meeting the contingency of the evidence, and under such circumstances it was held that the prosecuting attorney is not required before the case commences to elect upon which count he will proceed to trial.

Third. The court in its charge said to the jury:

“Now if you find that the record of such election introduced in evidence in the case shows the facts above stated, that is, that a majority voting at said election were against the sale, then you are instructed that the burden of proof that such election was illegal rests on the defendant; but the law does not require so strong a degree of proof of defendant upon that proposition as is required of the state, and it is only necessary that the defendant should show the illegality of such election by a preponderance of the evidence in the case. That is to say, that there shall be more evidence on that issue as claimed by the defendant than against it.”

This we think was error. In such case the burden does not change; it still continues with the state. The averment in the indictment is that the sale was made in a township where such sale was unlawful and prohibited. To this the accused plead not guilty; that is, he denied the averment. The state affirmed and the accused denied. It is true that Section 4364-24, Revised Statutes, provides that the record of the township clerk shall be *prima facie* evidence that the sale is prohibited if it shows that a majority were against the sale and that the selling shall be illegal. Still the question remains, was the selling prohibited, and upon that question there is a denial. The accused in no way admits that the selling was prohibited.

It differs entirely from the plea of self defense and insanity. In such cases the commission of the act is admitted and then justified or excused by necessity or irresponsibility; such pleas are in the nature of confession and avoidance. We think Mr. Underhill, in his work on Criminal Evidence, Section 23, expresses the correct rule.

“The general rule stated broadly, as laid down by the cases, is that the burden of proof and the obligation to convince the jury of the prisoner’s guilt beyond a reasonable doubt as to all essential facts, including the criminal intent, are upon the prosecution throughout the trial. There is no shifting of the burden of proof during the trial.

“This rule is clearly applicable in every case where the defendant by pleading ‘not guilty’ alone, and without qualification, stands upon a negative allegation, and does not rely upon any facts which are separate and distinct from, or independent of, the original transaction set forth in the indictment. By such a plea the prisoner restricts himself to denying and dis-

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approving the facts involved in the original transaction upon which the charge is based, including, of course, all the accompanying circumstances.

"The defendant is entitled to the benefit of the presumption of innocence before he introduces any evidence. Hence, though he offers no evidence, the court has no legal power to direct a verdict, but the *prima facie* case against him must be submitted to the jury. They must take into consideration the presumption of innocence, and should not convict unless the state has sustained the burden of proof. But when the defendant pleads any substantive, distinct and independent matter as a defense, which upon its face does not necessarily constitute an element of the transaction with which he is charged, it has been said that the burden of proving such defense devolves upon him. The accused must prove the independent exculpatory facts upon which he relies, and in this respect and to this extent, it is correct to say the burden lies on him."

He further adds:

"Notwithstanding this, if, after all the evidence is in, it is found that upon the whole case the prosecution has not sustained the burden of proof in convincing the jury of the prisoner's guilt beyond a reasonable doubt, he should be acquitted."

Whether the latter part of the section is correct or not it is not necessary now to determine. To the same effect are *Jones v. State*, 51 Ohio St., 331, and *Kelch v. State*, 55 Ohio St., 146.

In the case under consideration the record of the township trustees made out a *prima facie* case, it is true, but if no evidence had been offered by the accused, still the duty devolved upon the state to show that the accused was guilty of the offense charged beyond a reasonable doubt, one element of which charge was that he made the sale in a township where the sale of intoxicating liquor was prohibited. The accused relied upon no facts which were separate and distinct from, or independent of the original transaction. He did not plead or introduce evidence tending to prove any substantive, distinct and independent matter, as a defense; hence the charge of the court was clearly erroneous.

For these reasons the judgment must be reversed at the costs

of the defendant in error, and the case remanded for a new trial.

*N. H. Bostwick and George King*, for plaintiff in error.

*H. O. Bostwick*, Prosecuting Attorney, for defendant in error.

### SPECIFIC DEVISES.

[Circuit Court of Hamilton County.]

WOODRUFF V. WOODRUFF.

Decided, 1902.

*Wills—Specific and General Devises—Debts of Son to Estate of His Father—Superior to a Mortgage Lien—Executed by the Son on Land Coming to Him by General Devise.*

1. A debt due from a son to the estate of his father is superior to a mortgage or judgment liens against him on real estate coming to him from his father by way of general devise.
2. Where a devise reads, "All that certain piece or parcel of real estate on which we now live, situate on Mt. Auburn \* \* \* \* and all the income and profits of all the rest and residue of my estate, real, personal, and mixed," to the wife of the testator, and another item of the will devises, "said real estate on Mt. Auburn above described, and all the rest and residue of my estate, both real, personal and mixed \* \* \* \* after the decease of my wife, to my children, to be equally divided between them," the devise thereby made to a son of the testator is a general and not a specific devise.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

Heard on error.

This was an action in the court of common pleas for partition and an accounting, and for general equitable relief. The case in this court is on error to the judgment of said court, both sides prosecuting error to certain portions of the judgment of the court. The errors arise on the pleadings and the finding of facts and the judgment of the court. The facts are substantially as follows:

Edward Woodruff died in February, 1883, testate. He left surviving him his widow and seven children, of whom Horace

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W. Woodruff was one. His will was executed on January 13, 1881, and on January 29, 1881, he executed a codicil to said will. By the first item of his will he directs the payment of his debts; by the second item he gives to his wife for her life all of his estate, both real and personal, with power to sell and dispose of his household furniture, silverware, piano, bookcase and books, as she may deem best, and with power to change and reinvest in bonds and securities. In the devise of his real estate to his wife he says:

"I give and devise to my beloved wife \* \* \* all that piece or parcel of real estate on which we now live, situate on Mt. Auburn, in the city of Cincinnati, \* \* \* being the same property conveyed to me by Jethro Mitchell by deed dated September 28, 1872."

He further says:

"I also give and bequeath to her all the income and profits of all the rest and residue of my estate, real, personal and mixed."

The effect of this devise was to vest in his wife for her life his whole estate, after the payment of his debts, with the power to sell certain chattel property if she saw fit, and with power to change and reinvest bonds, stocks and securities. The third item of the will is as follows:

"I devise and bequeath said real estate on Mt. Auburn, above described, and all the rest and residue of my estate, real, personal and mixed, with all said household furniture, silverware, piano, bookcase and books, including the proceeds of my life insurance policy, after the decease of my wife, to my children, to be equally divided between them, the representatives of any of my children who may be deceased to take the share of such deceased child, respectively, under this will; this devise and bequest to my children being subject, however, to the devise and bequest to my said wife, as above made, which are to be in lieu of her dower in my real estate and in lieu of the statutory allowance for her support, or otherwise."

By the fourth item he appointed his wife executrix of his will. By the codicil to his will he directs and empowers his wife to sell certain parcels of this real estate, consisting of

certain lots, which are specified, in such manner as she may deem proper, and the proceeds she is to have during her natural life, and then it provides as follows:

“The principal, and whatever interest may remain, shall be divided between my children and their legal representatives, share and share alike, as provided in my said will for the other property.”

The widow elected to take under the will, and enjoyed the estate granted to her until her death, in the year 1897.

On June 1, 1882, Horace W. Woodruff borrowed of his father the sum of \$5,000, for which he gave his note, and this note remains unpaid, although he paid the interest on the same to his mother up to the year 1891. Horace W. Woodruff is insolvent, and the amount he owes the estate is greater than he would receive from the estate on distribution.

Horace W. Woodruff gave a mortgage on the Mt. Auburn homestead, and certain judgments were rendered against him, and executions on the same were levied on said real estate. The controversy here is whether this mortgage and the judgments are entitled to be paid out of his share of this particular real estate and his other portion of the real estate before he satisfies the note held by the estate against him.

Since the decision by our Supreme Court in *Keever v. Hunter*, 62 Ohio St., 616, we think there can be no doubt that unless the devise of the Mt. Auburn homestead is a specific devise, indicating that the testator intended that the devisee should enjoy this *in specia*, that neither Horace W. Woodruff nor his creditors may share in the estate until his debt to the estate is paid.

In the court of common pleas it was held that the devise of the Mt. Auburn real estate was specific, but that the other real estate devised was not. In holding that all the balance of the real estate devised was not specific and that it is subject to his indebtedness, we think the court was right, and it will not be considered further except as it comes under what we have to say as to the portion of the devise held to be specific.

We come now to a construction of the will. The law having granted to one the right to make a will, the courts have universally held that the intention of the testator as gathered from the whole will taken in connection with the surrounding circumstances must be given effect to, unless the expressed intention is contrary to law or against public policy. There are numerous other rules of construction but they must all bend to and conform to this rule so that nothing stands in the way of the expressed intention of the testator, unless it be contrary to law. This is a sound and reasonable rule and never likely to be departed from, for to hold that the intention of the testator was not to be carried out would, in effect, be to deny to the testator the right to make a will, as the *expressed intention* is the *will*. Carrying out this rule the courts have frequently said that adjudicated cases in which the intention of the testator has been determined give little or no aid in arriving at the intention of the testator in another and different will.

In *Robertson v. Broadbeck* (Law Rep., 8 App. Cas., 812), a question similar to the one in this case was before the House of Lords. Selborne, L. C., in giving his opinion, held the legacy in question not to be specific and gave a definition of a specific legacy. Lord Blackburn also gave an opinion and in doing so used the following language:

“I think that in considering the case below, more has been said as to the definition of what is a specific bequest, as if it was a technical question, than was quite requisite for the decision of the case. I do not know if it was necessary to give a definition of a specific legacy that any would come nearer to my idea than what has been said by the Lord Chancellor in this case: ‘Something which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed in the state and condition indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate.’

“I do not, however, like to bind myself even to saying that this is a precise definition. I think the real question is what is the true construction of the will of this testator. \* \* \* But it all comes round to the same thing. The court can not

make a will for the testator; it must construe the one he has made. And I think that the bequest of the residue of his effects, which shall not consist of money or securities for money to Mrs. Robertson, and the residue of his personal estate to the two trustees is one residuary bequest to two persons."

The general purpose of the testator evidently was to give all of his estate, real and personal, to his wife for her life, and at her death all of said estate remaining was to go to his several children or their descendants, to be equally divided between them. If there was any property left to the children in the nature of a specific devise it was not to be enjoyed *in specia*, as his wife was to enjoy it, but it was to be equally divided between them. Suppose a testator had three farms and three sons and no other lands and no other children, and he should devise farm No. 1 to his three sons to be equally divided between them, and he should devise the other two farms in the same way, these could not be considered as specific devises, but the devises would be nothing more than a devise of the whole of his real estate to his three sons to be equally divided between them; but if he had devised farm No. 1 to Thomas and farm No. 2 to William and farm No. 3 to John, these would be specific devises of separate property to separate devisees. Does the fact that the testator in this case mentions particularly one piece of real estate as going under his will and devises all his other real estate "as all the rest and residue of my estate, real" indicate an intention to separate this particular piece of real estate from the balance of his real estate, to be taken and held by them in any different way from the other real estate?

It seems clear that the intention of the testator that *all* of his estate remaining at the death of his wife should be equally divided among his children; not a part of it should be equally divided among them, but all of it. If this be the clear and plain intention, it must be given effect, and any technical rule of construction which might stand in the way must be disregarded. If the testator had said that he gave all of his estate to his wife for her life (with power to dispose of certain chattels and reinvest in certain securities), and the remainder to



go to his children at her death, it would be equivalent to what he has said.

In the devise of the life estate to his wife, he describes particularly his Mt. Auburn real estate; it was his homestead, and was the most valuable part of his real estate, and while not intending that she should hold this property in any different way than the balance of his real estate (which he devised to her by saying: "I give and bequeath to her all the income and profits of all the rest and residue of my estate, real, personal and mixed"). It was only natural that he should specifically describe the larger portion of his real property, his homestead, as he did; and as to his wife, there was to be no different holding of his estate except as to the matters already referred to. With these exceptions it was simply a life estate in his whole estate.

When he comes to the devise of the remainder to his children, he follows, in the main, the gift to the wife just preceding. He says: "I devise and bequeath said real estate on Mt. Auburn, *above described, and all the rest and residue of my estate, real, personal and mixed.*" This, no doubt, is the reason why the language employed is as it is; he had already given his wife a life estate in all his estate, and coming to give the remainder to his children, he uses as near as he can the same language used in the gift to his wife. In both instances he used more words in creating the devises than was absolutely necessary to effectuate his purpose, but this was not unreasonable. A will is rarely found that does not contain more words than is necessary to express the meaning of the testator.

Here the testator particularly mentions his Mt. Auburn real estate, but he does not immediately after state how he wants it divided or what he wants done with it; but he goes on and gives the balance of his real estate and all his personal estate, and says it is to go to his children "to be equally divided between them;" then he goes on and says, "*this devise and bequest,*" clearly indicating that there was but one devise to the children. If the testator had intended that his Mt. Auburn real estate should go to his children differently from the way that his other real and personal property should go to them, he certainly would

have used some more apt words to have expressed that intention, and would not afterwards have mentioned it as "this devise and bequest." The codicil also throws considerable light on the intention of the testator as to this devise. In this he provides for the sale of certain lots and the investment of the proceeds for the benefit of his wife during her life, with the remainder to "be divided between my children and their legal representatives, share and share alike, as provided in my said will for the other property," clearly indicating that there was but one provision in his will for the other property, and which was that it was all to be divided equally between his children as one gift of all his estate in which he describes with more or less exactness his real and his personal estate.

What was the effect of the testator giving to all his children all of his estate, real and personal, subject to the life estate of his wife? He gave them nothing but what they would have taken if he had made no will. It is equivalent to saying, I give to my children all my estate to which they are entitled under the law. Such a will is of no effect, and the heir takes by force of the statute rather than by will. This is an old and well established principle of the law. *Powell on Devises*, 284; 4 *Kent's Com.*, star pp. 506-7; *Ellis v. Page*, 7 *Cushing*, 161.

There is no necessity for making a will when property is given in the same way that the statute passes it; the object in giving the right to dispose of property is that it might be given in a way different from that in which the law gives it.

In holding that the Mt. Auburn property was subject to the mortgage given by Horace W. Woodruff, and to the judgment liens existing against it in favor of his creditors before the debt due his father's estate, we think the learned judge who gave the judgment erred, and so much of said judgment is reversed and the cause remanded to said court to carry this judgment into execution.

*William Worthington*, for plaintiff in error.

*Pogue & Pogue*, for defendant in error.

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**APPEAL BY A CO-EXECUTOR.**

[Circuit Court of Trumbull County.]

HENRY C. DOWNING, EXECUTOR, v. WILLIAM DOWNING ET AL.

Decided, February Term, 1902.

*Appeal—Undertaking for must be Given by a Co-executor—Transcript from Probate Court Must be Filed—Statute Governing such an Appeal.*

1. Where an executor, who is also a devisee under the will, desires to appeal from the finding and judgment of the probate court upon the allowance of a personal claim of his co-executor, the filing of a written notice of his intention to appeal is not sufficient, but he must execute an undertaking.
2. A transcript on appeal from the probate court must be filed in the common pleas by the party appealing, on or before the second day of the term of that court next after the undertaking or notice of intention to appeal is given; the filing within this time is mandatory.
3. In a proceeding for the allowance of a claim of an executor against the estate of the decedent, a co-executor is not a necessary party. The appeal from such an allowance is under Section 6101.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Heard en error.

Henry C. Downing, plaintiff in error, and William Downing, one of the defendants in error, were co-executors of the last will and testament of Isabell C. Downing, deceased. William Downing had a claim against his testatrix for services rendered for her previous to her death. He presented his claim to the probate court for allowance, under Section 6100, Revised Statutes. The court fixed a day for the hearing upon said claim and issued an order to said William Downing, requiring him to give notice in writing to all heirs, legatees and devisees interested in said estate and also to the creditors named in said order as required by said section. Henry C. Downing was a legatee under said will, and he, among other parties, was notified in writing by said William Downing of the presentation of his claim for allowance and of the time for hearing. Upon the hearing the claim was allowed in part by the probate court.

The finding and judgment of the probate court was made and entered on September 25, 1901, and on the same day Henry C. Downing as executor filed a written notice of appeal, setting forth in said notice that he was acting in a fiduciary capacity and was not required to give bond. This was his first appearance as executor. The probate court allowed the appeal without bond.

At the time of the making and entering of the findings and judgment by the probate court the term of the common pleas court had expired and the next term began September 30, 1901. The transcript of the docket and journal entries and the order and judgment appealed from was not filed with the clerk of the common pleas court until October 12, 1901. A motion was made in the common pleas court to dismiss the appeal, which was sustained, and the case is before this court upon error to reverse the judgment of the common pleas court dismissing the appeal.

The judgment of the common pleas court is sought to be sustained for two reasons:

First. That no bond was filed by appellant in the probate court and,

Second. That the transcript of the proceedings of the probate court was not filed in time.

It is claimed on the part of the plaintiff in error that he was not required to give bond for the reason that he was one of the executors and his appeal was in the interest of the estate.

In a proceeding for the allowance of a claim of an executor against the estate his co-executor under Section 6100, Revised Statutes, is not a necessary party. It is a proceeding between heirs, legatees, devisees and creditors, and the executor having the claim. The executor is the adversary party as against those interested in the distribution of the estate, and the fact that there is a co-executor does not alter the case under the statute. The co-executor would be presumed to be interested with and closely allied to his colleague.

It is true the last clause of the section says that: "Any other person having an interest in the estate may come in and be made a party thereto." This provision no doubt applies

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to such other persons as are in the classes designated in the statute heirs, devisees, legatees and creditors.

However that may be, Henry C. Downing, plaintiff in error, as executor, never asked to be made a party to this proceeding. He was already in the proceeding, having a personal interest as devisee. He represented himself in his personal interest, and if he desired to appeal, he should have given an undertaking in the same manner as any other party having a personal interest.

Was the transcript from the probate court filed in time with the clerk of the common pleas court? No claim is made but what the filing of the transcript in the time provided by the statute is jurisdictional. Indeed, none could be made. It was the duty of the appellant and not the probate court to file the transcript and the provision of the statute is mandatory, Section 6409, Revised Statutes, says it "shall be filed with the clerk of the court of common pleas on or before the second day of the term of said court, next after an undertaking or notice is given."

The claim of counsel for plaintiff is that under Section 6408, Revised Statutes, he had twenty days after the finding and judgment of the probate court to give the bond or notice of appeal, and that the second day of the term of the common pleas court being within that time that he had until the second day of the succeeding January term to file the transcript.

We do not think the position of counsel is tenable. The words of the statute are specific and definite, admitting of no such construction, "Which shall be filed with the clerk of the court of common pleas on or before the second day of the term of said court next after an undertaking or notice is given." Not next after the expiration of the time at which the undertaking or notice might have been given.

Appellant, plaintiff in error, having seen fit to file his notice of intention to appeal upon the very day the finding and judgment of the probate court was made, to-wit, on September 15, he should have filed the transcript upon the second day of the term, to-wit, on October 1; and October 12 was too late even if

the notice had been sufficient without the giving of an undertaking which, as we have seen, it was not.

It is of no importance probably, but the appeal was not under Section 6408, but under Section 6101, Revised Statutes. The appeal provided for in Sections 6407 and 6408, Revised Statutes, are those cases not specially provided for. In the allowance or refusal to allow a claim of an executor or administrator the appeal is specially provided for by Section 6101, Revised Statutes, and the time for giving of the undertaking is twelve days, and not twenty days, as provided in Section 6408, Revised Statutes. The special provision must govern; Section 4956, Revised Statutes, so determines. The judgment of the common pleas court is affirmed at the costs of Henry C. Downing and the case remanded to the probate court for further proceedings.

*T. H. Gilmer*, for plaintiff in error.

*Gilbert & Christ*, for defendant in error.

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#### JURISDICTION.

[Circuit Court of Hamilton County.]

MARIE L. HAFNER V. BANK OF ENTERPRISE.

Decided, July 25, 1902.

*Jurisdiction—Of the Circuit Court of the United States—Pleading—Waiver of Technical Defect in.*

1. The Circuit Court of the United States is not a court of special jurisdiction within the contemplation of Section 5090, Ohio Revised Statutes, but is a court of general though limited jurisdiction.
2. While the answer "Now comes the defendant and says that she denies" is technically not in good form, yet when the parties went to trial upon such answer below it will be treated on review as a sufficient general denial.

GIFFEN, J., SWING, J., and JELKE, J.

PER CURIAM.

Heard on error.

The answer, "Now comes defendant and says that she denies," etc., is technically not in good form, but as the parties went

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to trial below without objection to its form and on the assumption that it is a good traverse to the allegations of the petition, it will be treated here as a sufficient general denial. At all events, it could be cured by amendment.

We are of opinion that the Circuit Court of the United States is not a court of special jurisdiction within the contemplation of Section 5090, Revised Statutes. The provisions of this section are confined to judgments of inferior tribunals. *Wehrman v. Reakirt*, 2 C. S. C., 29; Seney's Code (1860 Ed.), p. 162, Section 120 and notes; *Memphis Med. Co. v. Newton*, 2 Handy, 163; *Hollister v. Hollister*, 10 How. Pr. (N. Y.), 532-539.

As against the provisions of this statute the Circuit Court of the United States is a court of *general* but limited jurisdiction (see *Dowell v. Applegate*, 152 U. S., 327, opinion per Mr. Justice Harlan, page 340), and as such has the right to pass upon its own jurisdiction, and its judgment is entitled to all the presumption in its favor which attaches to the judgments of courts of general jurisdiction of our own and sister states.

"Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the act of congress, passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

"The record of a judgment rendered in another state may be contradicted, as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record would be a nullity, notwithstanding it may recite that they did exist." *Pennywit v. Foote*, 27 Ohio St., 600; *Spier v. Corll*, 33 Ohio St., 236; *Wilhelm v. Parker*, 17 C. C., 234, 237; *Dodd v. Groll*, 19 C. C., 718.

The petition in this case alleges the jurisdiction of the Circuit Court of the United States of the District of Kansas, and the answer denies the same. Its jurisdiction is fairly put in issue. Conceding that the presumption which obtains in favor of the judgment sustains the burden on the plaintiff in the first instance, what evidence does an examination of the record disclose to rebut it?

(1) There is the testimony of the witness, R. P. March, in his deposition, "Exhibit B:"

"Were you personally acquainted with John A. Hafner and Marie L. Hafner?

"A. I was.

"Where did they reside in 1894?

"A. At Enterprise, Kansas, and they continued to reside there until some time in 1895."

(2) There is the evidence in the note itself dated "Enterprise, Kansas, November 1, 1893," also P. O. address,

"Enterprise, Kansas.

"Due November 1st, 1894."

(3) The fact that the action was brought in the district of Kansas.

Weighing this evidence as against the presumption, we find as a fact that Marie L. Hafner was a citizen of Kansas on June 29, 1894, and are hence of opinion that the Circuit Court of the United States had no jurisdiction of a cause of action between Marie L. Hafner and the Bank of Enterprise, both being citizens of the same state.

Judgment reversed.

*J. D. Creed and E. A. Hafner*, for plaintiff in error.

*Kelley & Hauck*, contra.



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**TRIAL FOR HAVING POSSESSION OF STOLEN GOODS.**

[Circuit Court of Summit County.]

PASQUALE CARANO V. STATE OF OHIO.

Decided, October Term, 1902.

*Criminal Law—Burglary and Larceny—Knowingly Receiving Stolen Goods—Mistake in Verdict as Rendered—Qualification of Jurors—Circumstantial Evidence—Effect of Having Stolen Goods in Possession.*

1. The language of a verdict should not be strained and a prisoner held to have been acquitted, where it is clear that the jury did not intend to find him not guilty, and it is not error in such a case to overrule a plea in bar against further proceedings.
2. The fact that a juror has served upon the trial of a plea in bar is not a ground for challenge upon the subsequent trial of the accused under the indictment, the trial of the plea in bar not being a trial of the cause within the meaning of Section 7278.
3. A juror who states that he has formed an opinion as to the guilt of the accused, but who believes that he can render an impartial verdict is not subject to challenge for cause, but is within the exception of the second paragraph of Section 7278.
4. Where it is admitted by the defendant that he has stolen goods in his possession, it is not error to refuse to charge with reference to circumstantial evidence tending to trace the goods from the place where they were stolen to his house.
5. It is not error to admit evidence as to packing material being seen in the car from which the goods were stolen, when it appears that some of the material was scattered between the car and the house of the defendant in which the goods were discovered.
6. Possession of stolen goods by a defendant soon after the theft was committed, raises a presumption against him which calls for an explanation as to how he came into possession of the goods.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

Error to the court of common pleas.

The plaintiff in error was indicted at the January Term, 1902, of the court of common pleas of this county, there being two counts in the indictment. The first count charged burglary and larceny, and set out in proper form that the defendant committed such burglary and larceny by breaking into a railroad car in the night season and taking therefrom a consider-

able quantity of goods, all set out in the indictment, and the charge is that this was done unlawfully, maliciously and forcibly; in short, everything necessary to constitute the crime of burglary and larceny is this count of the indictment.

The second count of the indictment charges the plaintiff in error with having received the same goods named in the first count of the indictment, and that he so received them knowing them to have been stolen.

To this indictment, and to each count of it, Pasquale Carano pleaded not guilty. He was put upon his trial before a court and jury, and at the close of the evidence and after argument of counsel and the charge of the court the jury retired, and upon coming again into court returned the following verdict: \* \* \* "do find that the prisoner at the bar, Pasquale Carano, is guilty of receiving stolen goods valued at \$48.84, and do not find as charged in the first and second counts in indictment. S. P. Thompson, *Foreman*." Thereupon the court inquired of the jury if some mistake had not been made in their verdict, to which the foreman of the jury replied that they had made a mistake. The jury were then instructed to retire to their room and agree upon a verdict, which should be responsive to the indictment. The jury then retired again to their room, and upon again coming into court returned a verdict in which they found that the prisoner "is guilty as he stands charged in the second count in the indictment, and not guilty as he stands charged in the first count in the indictment, and fix the value of the goods at \$48.84. S. P. Thompson, *Foreman*."

A motion was then made by defendant that he be discharged, notwithstanding the verdict, and for cause say, that the verdict first returned by the jury was, in effect, a verdict of not guilty, and that the court had no authority to require further verdict of the jury. This motion the court overruled, and error is charged in that regard.

Thereafter a motion was made by the plaintiff in error for a new trial, and this motion was granted. Carano was then called upon again to plead to the indictment, and he thereupon filed a plea in bar to any further proceedings under the indictment,

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setting up the return of the verdict first herein before quoted, the claim again being made that this verdict was equivalent to a finding by the jury that he was not guilty as charged in the indictment. This plea in bar was submitted to a jury, and the evidence adduced established substantially what has been already said as to the occurrences at the time of the return of the first verdict in the case. At the close of this evidence the court directed the jury to return a verdict upon the issue of the plea in bar against the defendant, and error is claimed in this regard.

The question then raised as to all the proceedings thus far set out in this opinion is whether or not the first verdict returned by the jury was such as to preclude further proceedings against the prisoner. If the verdict was, in legal effect, a return by the jury of not guilty as to each of the counts in the indictment, then the prisoner was entitled thereupon to be discharged. If this is not the legal effect of the verdict, then the action of the court in directing the jury to return to its room and further consider its verdict, and in directing the jury in the trial upon the plea in bar to return a verdict for the state, was right.

The verdict originally returned is peculiar, and there can be little doubt that it was returned under a mistake on the part of the jury; indeed, Mr. Thompson, who was the foreman of the jury, so stated to the court at the time it was returned when inquiry was made of the jury as to whether or not a mistake had been made. This appears from evidence taken upon the trial of the plea in bar, as shown at page 17 of the bill of exceptions. It clearly was not the intention of the jury to find the prisoner not guilty as to the second count in the indictment, notwithstanding which, if they have said by their verdict that he was not guilty as charged in either the first or the second count, then the plea in bar was well taken, and the prisoner was entitled to his discharge. Where, however, it is clear that the jury did not intend to find the defendant not guilty, the language of the verdict is not to be strained to make it result in an acquittal. The language is that the jury "do not find as charged in the first and second count in indictment." Tech-

nically, this is a statement of the jury that they make no finding as to whether the defendant was guilty or not under either count in the indictment. What precedes this in the verdict clearly shows that they did intend to find him guilty of the offense charged in the second count in the indictment, but they were mistaken as to this being the second count.

As has already been said, if the verdict stated that they found him not guilty as charged in this second count, then, though a mistake was made, the prisoner would have been entitled to be discharged; but it would be a straining of words to make the language used in the last part of the verdict a finding that the prisoner was not guilty as charged in the second count.

The court, therefore, did not err in refusing to discharge the prisoner, nor in charging the jury on the trial of the plea in bar to return a verdict against the defendant.

This view is supported by the case of *Commonwealth v. Call*, 38 Mass. (21 Pick.), 509, and in *State v. Arthur*, 21 Ia., 322, 323. In this last case the prisoner was tried upon an indictment charging him with having in his possession at the same time five or more pieces of false and counterfeit money, etc. The verdict returned was that the defendant is "guilty of having had in his possession five half dollars, four of them counterfeit coin, one doubtful, and two quarter dollars counterfeit coin, with intent to pass the same." On page 325 the court, in discussing the case, speak of this verdict and say that it was fatally defective in failing to find that the prisoner had this counterfeit coin with a knowledge, etc., and say:

"It partakes of the nature of a special verdict. ' s it certainly is, rather than a general verdict, as defined by the statute. Assuming it to be such, then, as it did not pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, the order should have been that they 'retire for further deliberation.' "

The verdict against the prisoner having been returned on the trial on the plea in bar, the prisoner entered the plea of not guilty, and the court proceeded to impanel the jury; and upon this second trial a verdict of guilty as charged in the second count of the indictment was returned. A motion for a new

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trial was made and overruled, and judgment and sentence were pronounced upon the verdict.

Complaint is made that the court erred in the impaneling of the jury for this trial. The jury was made up chiefly, if not altogether, of those who constituted the jury upon the trial of the plea in bar, and each juror was challenged for that cause. Section 7278, Revised Statutes, provides for what causes a juror may be challenged. Among those, the fifth reads:

“That he served on a petit jury that was drawn in the same cause against the same defendant, and which jury was discharged after hearing the evidence, or rendered a verdict which was set aside.”

It is this clause of the section which, it is said, the court disregarded in impaneling this jury. It is clear that the jurors challenged did not come within the letter of this clause of the section. No one of them had served as a juror in the same cause. The cause for which this jury was impaneled was the prosecution by the state against the prisoner under the indictment. That cause had not been tried to this jury, nor to any of these jurors. No evidence tending to prove or disprove the guilt of the prisoner had been heard upon the trial of the plea in bar; nothing had transpired upon that trial calculated to show either that the prisoner was or was not guilty as he was charged in the indictment; and if the several jurors were (as for all that had transpired in that case, they well might be) unprejudiced, there was no ground for challenge.

It is especially urged that as to the juror, Mr. Wuchter, the court erred, because upon his examination at the time the jury was impaneled he made certain answers to questions put to him. The questions put to him were in reference to the hearing upon the plea in bar, and this was asked of him:

“Mr. Wuchter, you heard what took place yesterday in regard to this case; I will ask you if what you heard, what you saw, left any impression upon your mind in regard to the guilt or innocence of this defendant of receiving stolen property which would require evidence to remove from your mind?”

To this he answered: “Well, it might be possible.”

Question: "Then, as I understand, you say it is possible that an impression as to the guilt or innocence of the defendant was left upon your mind which might require evidence to remove from your mind?"

To this Mr. Wuchter answered: "Yes, sir; I think so."

Mr. Wuchter was then sworn and was questioned, and he answered that no impression which was upon his mind resulted from any conversation that he had with the defendant or with any witnesses in the case so far as he knew. He says further, that he did not get any impression from reading any newspaper articles, and still further he was asked this question:

"Now then, do you think that, notwithstanding that, you could fairly and impartially try this defendant and render a fair and impartial verdict; without reference to that, do you think you could do that?"

To this he answered: "I think I could do that; yes, sir."

Upon further questioning he emphasizes the statement that he thinks he could try the case impartially, and challenge as to him was overruled. The juror seems to have brought himself clearly within the exception provided in the second paragraph of Section 7278, Revised Statutes, which reads:

"\* \* \* but if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine such juror on oath as to the grounds of such opinion, and if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinions, and if the court is satisfied that such juror will render an impartial verdict on the evidence, may admit him as competent to serve in such case as a juror."

There was no error in the ruling of the court in this regard.

Complaint is further made that the court erred in admitting certain evidence produced by the state and admitted over the objection of the plaintiff in error. Especial attention is called to the witness, Goodenberger, whose testimony begins on page 83. The testimony specially complained of, however, is found on page 86. The witness was a police officer of the city of Akron and was one of those who found that the car, from which

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it was said that goods, for the concealing of which the prisoner was on trial, were taken, had been broken open, and this question was put to him:

“Do you remember of finding any packing material about the floor of either of these cars?”

This was admitted over the objection of the defendant. There was no error to the prejudice of the prisoner in the ruling of the court upon this question. As appeared further on in the case, it was sought to show that there was packing material found in the car, and that such material was scattered along the pathway leading from this car to the house of the defendant in which the goods in question were found by the officers.

Similar complaint is made as to testimony about letters which it is claimed were scattered along this pathway. Each of these circumstances tended to show that the goods were carried from the car from which they were taken to the house of the defendant, and it would have been clearly competent to introduce such circumstances in evidence, but for the admission on the part of the prisoner that the goods found at his house were those taken from the car. On the prisoner's part the claim was made that he purchased the goods of a peddler who came to his house very early in the morning carrying what must have been, as the exhibits in this case show, a tremendously large and heavy package of goods. The state claimed that if the prisoner did not commit the burglary and larceny, it was committed by others living in his house, and evidence tending to show that the goods were carried directly from this car to the house of the prisoner was pertinent as tending to show his knowledge of the way in which those who brought him the goods obtained them.

Without going over severally the other questions as to the rulings upon evidence shown by the bill of exceptions, the court finds no error as to any ruling upon questions of evidence.

Complaint is further made that the court erred in refusing to charge as requested by the defendant; especially, it is said, that there was error in refusing to give the fifth request made. That reads:

"The evidence for the state in this case being largely what is known as circumstantial evidence; that is, a chain of facts and circumstances from which you are asked to infer the guilt of the defendant. You should not convict the defendant on such evidence unless these facts and circumstances, taken in connection with all the other evidence in the case, are consistent with each other and with the guilt of the defendant, and are wholly inconsistent with the innocence of the defendant on any reasonable hypothesis."

There are cases in which this charge would have been eminently proper. In this case it would have been likely to mislead the jury, if it had any effect upon them whatever. This was not an ordinary case of circumstantial evidence. The fact that the goods taken from the car were, shortly thereafter, found in the possession of the prisoner, did not at all depend upon circumstances. As has already been said, that was admitted. This admission raised so strong a presumption against the prisoner as to call upon him to explain how he came into possession of the goods.

It is true, as said in the case of *Methard v. State*, 19 Ohio St., 363, that "the facts of burglary, or larceny, and of possession of the stolen goods soon thereafter by the accused, do not alone raise a *presumption of law* that he is guilty of both the burglary and larceny."

In the opinion in the same case, on page 368, this language is used:

"The fact that a building was burglariously entered, goods stolen therefrom, and the possession by the accused soon thereafter of the goods stolen, are competent evidence to go to the jury, and, in connection with other circumstances indicative of guilt, such as giving a false account, or refusing to give any account, of the manner in which, or the means by which, he came into possession of the stolen goods, that may afford a strong *presumption of fact* of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and larceny."

In Lawson Pres. Ev., 519, the following quotation is made from Hale's Pleas of the Crown:



“As a general proposition, where the person is in possession of property, it is reasonable to suppose that he is able to give an account of how he came by it, and when the property in question has belonged to another, it is, in general, not unreasonable to call upon him to do so. If the change of possession has been recent, he will not be likely to have forgotten, still less if it be an article of bulk or value. If, then, it be reasonable under such circumstances to call upon the party in possession to account for such possession, it can not be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account, or is unable to give a probable reason why he can not.”

In 1 Roscoe Crim. Ev. (side paging), 21, it is said:

“If the property be proved to have been stolen, or may fairly be presumed to have been so, then the question arises whether or not the prisoner is to be called upon to account for the possession of it. This he will be bound to do, and, on his failing to do so, a presumption against him will arise, if taking into consideration the matter of the goods in question they can be said to have been recently stolen. The presumption will be either that he stole the property, or that he received it, knowing it to be stolen.”

If the state had been depending upon circumstances to show that the goods came into the possession of the prisoner shortly after they were stolen, the request might well have been taken, but that was a conceded fact in the case, and hence the rule which would be applicable to the case of tracing the goods to the defendant by circumstances is not applicable in this case. The charge given to the jury stated the law applicable to the case, and so stated it that if followed by the jury, no mistake would be made. There was no error in refusing to charge as requested, and no error, for which the case should be reversed, in the charge given to the jury.

As to the motion for a new trial upon the facts of the case, there was clearly no error in overruling the motion. Whoever reads the record of the case will have very little doubt but that the conviction was right, and surely no court would be justified in saying that the jury might not have been satisfied beyond a reasonable doubt of the guilt of the prisoner.

The judgment of the court of common pleas is affirmed.  
*Wilson & Grant* and *W. A. Spencer*, for plaintiff in error.  
*H. M. Hagellbarger*, Prosecuting Attorney, and *C. S. Cobbs*,  
 for the state.

**ASSUMED RISK.**

[Circuit Court of Geauga County.]

CLEVELAND & EASTERN RAILROAD CO. v. HOMER SOMERS.

Decided, 1902.

*Defective Appliances—In the Form of Hand Couplers—For Railway Cars—Assumed Risk by Brakeman—Who Had Knowledge that Automatic Couplers were not in Use—The Statutory Requirement as to Automatic Couplers—Not Applicable to Electric Railways or Railways in Process of Construction.*

1. A brakeman who has full knowledge before entering the service of the company that its cars are not equipped with automatic couplers assumes the risk of coupling by hand.
2. The statute providing that railway companies shall equip their cars, is not applicable to roads in process of construction or to electric railways.
3. It is not error to refuse to direct a verdict for defendant company in a suit by a brakeman who is injured in making a coupling, where the car was loaded with rails extending a foot over the end, necessitating the removal of the brake-staff.

BURROWS, J.; LAUBIE, J., and COOK, J., concur.

Heard on error.

Somers was injured while engaged as a brakeman in coupling cars, and recovered judgment for this injury.

The petition alleged that the company had failed to provide automatic couplers, as required by the statute; and that the plaintiff, without fault on his part, was injured by reason of the neglect of the company in this and other particulars mentioned in the petition.

It was an undisputed fact in the case that the plaintiff, Somers, had full notice and knowledge that none of the cars of the company were provided with automatic couplers.

1. The court charged the jury that it was the duty of the company to have provided such couplers; and further charged the jury that "if the plaintiff knew that there were no automatic couplers, then the burden would be upon the plaintiff to show, by a preponderance of the evidence, that he used and exercised ordinary care before he would be entitled to recover, provided the injury occurred solely by reason of the want of this automatic coupler." This was error. There was no circumstance taking the case out of the general rule that a servant assumes the risks incident to his employment, including defective appliances of which he has knowledge. If he was injured solely by reason of hand couplers being used instead of automatic couplers, he would not be entitled to recover, however careful he may have been.

We are also of the opinion that the court erred in holding that it was the duty of the company to provide automatic couplers, and this for the reason that the statute is not applicable to electric cars, and was not intended to apply to them, and for the further reason that the statute only applies to railroads or parts of railroads in operation, and not to railroads in process of construction, and the cars in use for that purpose.

2. The court erred in charging the jury that the plaintiff might recover if they found that he was without fault, and that he was injured by reason of the negligence of the company in any of the particulars mentioned in the petition. The petition charged that the defendant was negligent in not equipping its cars with automatic couplers; also in the use of cars defectively constructed; also improperly using an angle iron to block the loaded car, and also in providing coupling appliances that were defective and out of repair.

A verdict for plaintiff could not properly have been based upon any of these alleged grounds of negligence, for reasons already given, as to the want of automatic couplers, and, as to the other of said grounds, because there was no evidence tending to prove either that the company was guilty of negligence as to them or that his injury was caused thereby.

When the court came to charge the jury, none of these things were in the case, and the jury should have been told that the

only grounds of negligence upon which they could place their verdict for plaintiff were the improper loading of the flat car and the neglect to have the brake set on the loaded car. Under the instructions given the jury, they may have based their verdict upon some of the other grounds of negligence that had on the trial been eliminated from the case.

3. The court also erred in refusing to charge the jury upon the question of the assumption of the plaintiff of the risks incident to the doing of his work in the way it was done. Evidence was given tending to show that the plaintiff knew that the rails were thirty-two feet in length, and the floor of the car only thirty feet, and that the rails loaded upon these cars projected beyond the floor at either end a foot, more or less; and knew also that in loading the rails the brake-staff was often, if not always removed, and a block placed under the wheel of the car to keep it in place when necessary, on account of the grade. On the occasion when plaintiff was injured the car was blocked on account of the grade, the brake-staff was removed, and the loaded rails extended about a foot beyond the floor of the car. The defendant below requested the court to charge that the plaintiff could not recover if he knew that the rails projected and the brake was not set at the time he undertook to make the coupling. This request was not given, either in form or substance, but the jury was, however, instructed that he could not recover if he was guilty of contributory negligence. If the plaintiff was familiar with the mode theretofore usually adopted in doing this business, and knew that these rails projected beyond the floor of the car, and undertook to make the coupling with that knowledge, he assumed the hazard of any injury he might receive therefrom. He had to look out for the projecting rails, if he knew they were there, just as he had to look out for the bumpers, or the car wheels, or any other danger necessarily connected with that business.

The more serious question relates to the refusal of the court to direct a verdict for the defendant. The certain cause of the injury was the extension of the rails beyond the floor of the car, and the neglect of the plaintiff to keep his head below the rails at the time he was coupling the cars. If there had been no

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projecting of the rails, or if the plaintiff had kept his head below the rails, there would have been no accident or injury. Whether the removal of and neglect to use the brake in any way helped to cause the accident is a matter of conjecture. The testimony is not very explicit and certain as to the knowledge of the plaintiff in respect to the projection of the rails or removal of the brake-staff; and while it seems to be highly probable that he did see or would have seen these projecting rails, if he gave such attention to the surroundings as a man of ordinary prudence would usually give under like circumstances, yet we think the case was one for the jury.

#### GIFT OF A MORTGAGE.

[Circuit Court of Lorain County.]

DELLA M. PRINDLE v. MALCOLM H. WOOD ET AL.

Decided, October 12, 1902.

*Gifts—A Mortgage to a Daughter—Becomes an Executed Gift by the Recording of the Mortgage.*

A mortgage on real estate made payable in small annual installments to the mortgagor during his life, payment of the installments to be continued after his death to his wife, and all remaining unpaid at the death of the wife to go to their daughter, becomes an executed and valid gift to the daughter upon the recording of the mortgage; and the residue remaining after the death of the parents belongs to the estate of the daughter, notwithstanding her death occurred prior to the death of either parent.

HALE, J. (orally); CALDWELL, J., and MARVIN, J., concur.

The case of Prindle v. Wood et al, comes into this court by appeal. The facts are agreed upon, or there is no issue as to any fact in the case.

It appears that on February 21, 1894, Harrison B. Wood, an old resident of this county, conveyed to his son, Malcolm H. Wood, 120 acres of land in Carlisle township for the consideration of \$3,000, and at the same time he took from his son a mortgage to himself, his wife and his daughter. That mortgage in part reads:

"Know all men by these presents, that we, Malcolm H. Wood and Mary R. Wood, the grantors, for the consideration of \$3,000, received to our full satisfaction of Harrison B. Wood, Gratia C. Wood and Effa May Wood, the grantees, do grant, bargain, sell," etc. "The condition of this deed is such, that whereas the said Malcolm H. Wood is indebted to said Harrison B. Wood in the sum of \$3,000, which said Malcolm H. Wood is to pay in installments as follows, and to the persons named, to-wit, to said Harrison B. Wood the sum of \$200 on the first day of April each and every year, commencing April 1, 1895, and continuing during the lifetime of said Harrison B. Wood, or until the same shall be fully paid. At the decease of said Harrison B. Wood what still remains unpaid of said \$3,000 shall be paid in installments on the same date to the said Gratia C. Wood, so long as she shall live, or until the same shall be fully paid; at her death whatever may remain of said \$3,000 shall be paid at the same time to Effa May Wood."

Harrison B. Wood died in 1897. Up to his death payments were made to him precisely in accordance with this mortgage. Mrs. Wood, his wife, died in 1900, and the payments were made to her up to the time of her death. Effa died shortly before her father.

At the death of Mrs. Wood there remained unpaid about \$2,000. The question of law submitted is, whether that mortgage and the residue unpaid at the death of Mrs. Wood belonged to the estate of Harrison B. Wood or to the estate of Effa May Wood. The administrators of both estates are parties to the suit, and each claims for the estate he represents the unpaid balance.

It is said by counsel representing the estate of Harrison B. Wood that this is, at most, an unexecuted gift on the part of Harrison B. Wood to his daughter, Effa May, and created in her no vested right in the mortgage; that the consideration, as is conceded here, moved entirely from Harrison B. Wood, Effa May paying no part of the same.

It must be conceded that to constitute a valid gift of chattels the donor must part with all dominion over the property, and deliver the same to the donee. We suppose this applies as well to an indebtedness as to any other class of property. The gift of a promissory note by a donor against a third party would require an indorsement and delivery to pass the title to a donee and perfect the gift.

But supposing a father, desiring to make a gift to a daughter, loans to a third party \$1,000 and takes his note therefor, payable to the daughter, which he delivers to her, it would constitute a valid gift.

Supposing, instead of a note simply, he takes a note payable to the daughter and a mortgage in which she is named as the grantee, and delivers both the note and the mortgage to the daughter, is there any doubt about its constituting a valid gift?

Supposing the whole contract is written in the mortgage, the daughter named as the grantee, and the mortgage delivered to the daughter and placed on record, we think it would constitute still a valid gift.

We hold further, that a mortgage given to a daughter, under the circumstances indicated, in which the daughter is named as the grantee, the father paying the consideration, and causing the same to be recorded, would become an executed and valid gift. The record of the mortgage would take the place of a manual delivery, and the acceptance of the gift by the donee, under such circumstances, is presumed.

That is this case, except that it was not made entirely to the daughter; but as to the amount due upon the mortgage at the death of Mrs. Wood we think that the same rule would apply. To the extent of the residue remaining unpaid at the death of Mrs. Wood there was a valid gift to the daughter, and such unpaid remainder belongs to the estate of Effa May Wood, and a decree may be taken accordingly.

**SIDEWALK IMPROVEMENTS AND BIDS THEREFOR.**

[Circuit Court of Summit County.]

Z. T. TROWBRIDGE ET AL V. VILLAGE OF HUDSON ET AL.

Decided, October 27, 1902.

*Sidewalks—Construction of, under Section 2330b—Not Dependent Upon Certificate that Money is in the Treasury—Discretion of Counsel in the Acceptance of Bids.*

1. The construction of sidewalks under Section 2330b is not dependent upon compliance with the requirement of Section 2702 (Burns Law) that no contract involving the expenditure of money shall be entered into by a municipal corporation without a certificate that the amount necessary to meet the expense of the improvement is in the treasury and not otherwise appropriated.
2. In awarding a contract for the construction of sidewalks, the bids received are not competitive and the counsel is not bound to accept the lowest bid; and the discretion of counsel where exercised in good faith in awarding such a contract can not be interfered with by the courts.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

The plaintiffs bring this action in behalf of the village of Hudson to prevent the village from constructing sidewalks in a manner, as they claim, different from that provided by the statute.

The village took action under Sections 2330b and 2330c, Revised Statutes, to construct sidewalks on certain streets in the village of Hudson. On July 9, 1901, a preliminary resolution declaring it necessary to provide stone walks for the village, was passed by the council, and, at the same meeting, another resolution was passed and the mayor of the village was instructed to call a special election for the purpose of submitting to the electors of the village the question of whether bonds should be issued to meet the expense of constructing the walks. On July 31, 1901, at a special meeting of the council called for that purpose, a resolution was adopted providing for the holding of a special election on Tuesday, August 13, 1901, at which election the question of issuing \$7,000 worth of bonds for sidewalk improvements was submitted



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to the electors, and at which election the majority of the electors of the village voted in favor of issuing the bonds.

At a meeting of the council on the fourth of January, 1902, a general sidewalk ordinance was adopted by the council and thereafter the clerk advertised for bids for furnishing stone and building of stone sidewalks in the village; the bids to be in by twelve o'clock noon on Wednesday, July 2, 1902. Bids were received in response to this notice, and the notice was duly published. At a meeting held July 12, 1902, the bids were opened and taken up in their order by resolution duly passed. The bids of Bernard, Stocker & Slaughter, and Paul & Henry were rejected. The bid of D. A. Ely was accepted. On July 14, 1902, a contract was entered into, signed by the mayor and clerk, with Ely, as provided by law. On July 28, 1902, this action was begun in the court of common pleas to restrain the village and Ely from entering into the contract and also from carrying out the same.

The first question to be considered is: Is the contract between the village of Hudson and Ely illegal and void because the clerk did not certify to the council that the money required for the contract was then in the treasury to the credit of the fund from which it was drawn, and not appropriated for any other purpose? This question is determined by determining whether that section applies to the matter of building sidewalks as under the provisions of the statute under which the council acted in this case.

Section 2330b, Revised Statutes, provides how the expense of constructing sidewalks is to be met, and authorizes the council to issue bonds of the village; and further provides the "bonds may be sold for not less than their par value and the proceeds applied to the construction of such sidewalks, or the council may use the bonds at their par value in payment of contractors without advertising for their sale. And the statute further provides that any property owner may elect whether he or she desires to pay cash for their improvement or have it placed upon the tax duplicate as in such statute provided; and, if any person elect to pay cash and he or she refuses to do so within thirty days after the completion of the work, then the clerk shall certify the amount to the auditor together with the interest due thereon as

provided. It clearly appears from the statute itself that the amount necessary to complete the work could not be known until the work was completed.

Section 2702, Revised Statutes, in our opinion, does not apply to cases where the work to be done is not to be paid for in cash but is to be done on credit (*Cincinnati v. Holmes*, 56 Ohio St., 104). It clearly appears from this case that the object of the Section No. 2702 is to restrain the officers of a village or any municipality in fixing an indebtedness on the corporation without any treasury to meet it; and where a statute provides for bonds being issued upon the election of the electors of the corporation, the statute has no place.

Section 2330b, Revised Statutes, aside from authorizing the making of a particular kind of improvement, provides the mode and manner in which the funds are to be raised and defray the cost and expenses of it. That being true, the statute itself contemplates that the money is not in the treasury but is to be raised upon the issuing of bonds upon which question the electors themselves vote. And hence, as we hold, Section 2702, Revised Statutes, has no application to the case under consideration.

The second contention on behalf of plaintiffs is that the council had no authority to reject the bids of all the contractors except that of Ely and award the contract to him. The latter part of this section (above referred to) is "the council may reject any or all bids." But it is claimed that any provision found in this chapter of the statutes on this subject is applicable to this case; and the plaintiffs to make out their case go back to a former section and endeavor to make it apply to the case at hand. If no provision was made in the section itself, it might be true that former sections might apply, but where the section itself provides what the council may do with the bids, it must be held that it was the *intention* of the Legislature that that provision should govern and not the provision found in former sections of the statute. The statute provides for the bids being on file ten days before the contract is awarded, and provides that all bids shall designate the material proposed to be used. These provisions were made with the object or purpose of giving the council sufficient time before the awarding of the contract to investigate

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the kind of material each bidder proposed to use, in order that it might select not only the *kind* of material but the *best* material. The *intent* of the statute is that the council may advertise for bids for either stone or cement or both, and after the bids are in and the council learns the prices and the kinds of material that is proposed under the prices, the council may then select the kind of material it will use and the quality of that kind, and then select the bid that complies with that quality and kind; and, when the statute gives authority "to reject any and all bids," it means what it says, may reject the lowest as well as the highest, may reject any bid, may reject all but one; that one may be the lowest in price for the material selected and the quality of material selected. The one that they select may be the highest in expense but best in quality, and, in the end, the cheapest to the village. This statute was not intended, however, to give the authorities of a municipality power to act corruptly and accept bids that would be greatly to the disadvantage of the village, through motives of fraud or corruption. The intention of this statute brings it clearly within the case of *The State v. Board of Ed.*, 14 C. C., 15. There it was held that where a board of education advertises for bids for constructing a heating plant for a school building, the board is not bound to accept the lowest bid; that bids in such a case are not competitive; that many things besides price enter into the determination as to which would be the better system.

So, in *this* case, the statute reserves the right to the village authorities to reserve their determination of the kind of work it will put down, until *after* the bids are opened and the kind of material selected where different qualities of material appear in the different bids.

Under such facts it is clear that the Legislature intended that when the bids are opened, the kind and quality of material is selected, that any bid that meets the requirement of the selection may be accepted and it need not necessarily be the lowest in actual figures.

In *McClain v. McKisson*, 15 C. C., 517, which is affirmed in the Supreme Court (*McClain v. McKisson*, 54 Ohio St., 673), it was there determined that the judgment of the trustees of the

water-works board of the city of Cleveland as to the liability of the lowest bidder is final. Courts can not interfere with that option or decision of the council once exercised.

But, notwithstanding this matter is left largely, if not wholly and entirely, to the option of the village authorities, yet we received testimony as to which of these bids was the lowest, it being contended by plaintiffs that there was one bid that was lower than the bid accepted, but, after receiving that testimony, the amount of the different kinds required is left in such uncertainty that the court is unable to say that the bid not accepted is lower than the one accepted. Then, too, there was a difference in the quality of the stone, and the evidence before us clearly shows that the Peninsula stone is a better stone than the Independence stone; it is less subject to changes by action of water and air, less liable to split, and has much less of iron in it. And we see nothing in this evidence to indicate that the council did not act in the utmost good faith in awarding the contract to the defendant to whom it did award it; and there is evidence here in the case to show that the action is brought largely, if not wholly, in the interests of another stone company.

We find no reason under the law and evidence of this case why the restraining order asked for should be granted, and the plaintiff's petition is dismissed.

*A. S. Cole and I. H. Phelps, for plaintiffs.*

*Grant & Sieber, for defendants.*

## TRUST ESTATES.

[Circuit Court of Hamilton County.]

PERCY JONES ET AL V. WILLIAM A. PROCTER ET AL.

Decided, November 6, 1902.

*Pleading—Motion for Judgment not Available, when—Trust Estate—  
Suit for Accounting—Partnership Interests—Power of Trustees as  
to Disposition of.*

1. A motion for judgment on the pleadings is not available to settle important questions of law, or to dispose of the merits of the case; under such circumstances resort must be had to demurrer.
2. Where the petition in a suit for an accounting as to a trust estate does not aver in what particular, if any, the estate was injured by the compromise complained of, the plaintiffs are not entitled to the relief prayed for.
3. Trustees authorized by will to continue a partnership business have, by implication, power to settle the affairs of the partnership at the time appointed for its dissolution, or earlier if clearly in the interest of the trust.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

By the amended petition filed May 13, 1898, and the amendment thereto filed July 2, 1898, plaintiffs, for a cause of action against the surviving partners of Procter & Gamble, aver that they are the residuary devisees under the will of William Procter, deceased, and as such own an undivided one-eleventh of the residue of said estate; that his interest in the partnership was devised to William A. Procter, James N. Gamble and James Morrison, as executors and trustees upon the trust; that they continue the interest in said business during the life of his widow, Olivia; that James Morrison was succeeded by Thomas Morrison as executor and trustee; that all of said trustees qualified and executed said trust to the extent of continuing the business until 1890, when the plant and business was sold to a corporation known as the Procter & Gamble Co., the widow of said William Procter being then alive; that by the terms of said will the interest of plaintiffs was to be held by the trustees during the life of Jane Clark Jones, the mother of the other plaintiffs; that no settlement of the partnership business was made by the execu-

tors and trustees with the surviving partners; that the surviving partners other than the trustees received the entire consideration paid for the assets of said partnership, partly in cash and partly in stock of the corporation; that at the time of said sale the estate of William Procter was entitled to receive  $22\frac{1}{2}$  hundredths of said purchase money and stock, and that said surviving partners were obligated to account to and with said estate for that proportion of the amount so received by them, and also for the profits made in the business; that the executors and trustees refused to bring this or any action; that said trustees, about November 29, 1893, resigned the trust of the portion coming to these plaintiffs, and the Central Trust & Safe Deposit Co. was appointed trustee of that portion in their stead. The prayer is for an accounting.

The defendants for answer say that the Central Trust & Safe Deposit Co., as trustee, accepted from the defendants the sum of \$25,000 in full settlement and satisfaction of any and all claims and demands against the surviving members of said partnership, and thereby released these defendants from all liability.

The plaintiffs for reply say that they refused to accept said sum of \$25,000 in full settlement, and that the trust company, as trustee, had notice of such refusal prior to November 29, 1893; that defendants, with full knowledge of said refusal, did, on November 29, 1893, voluntarily pay said sum of \$25,000 to the Central Trust & Safe Deposit Co., as trustee.

The case is now submitted on a motion made by the defendants for a judgment upon the pleadings. This motion can not be entertained, for the reason that a motion is not available to settle important questions of law, or to dispose of the merits of a case. This is the office of a demurrer, to which resort may be had (*Finch v. Finch*, 10 Ohio St., 501; *Illinois Cent. Ry. Co. v. Adams*, 180 U. S., 28). But inasmuch as the defendants may withdraw the motion and file a demurrer to the reply, we will consider the case as though thus presented.

The question then is whether the trustee had any authority to compromise the claim of the plaintiffs, and if not, whether they had recourse on the trustee alone or also on the surviving members of the firm. Counsel for plaintiffs claim that the only duty

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imposed on the trustee by the terms of the will was to hold the residue of the estate after it was ascertained and accounted for by the executors, and that there could be no residue until they had settled in the probate court and were ordered to pay the balance in their hands to the trustee.

It does not appear from the petition what the executors did in the settlement or management of the estate, except that they continued the partnership business, and acquiesced in the sale of the same to the corporation. In the absence of averment to the contrary, we are justified in assuming that the executors had fully settled the estate other than the interest in the partnership business, which, in itself, composed the residue.

It was the management of this interest that the testator had in view when he appointed the trustees, and their powers were as full and complete, if not more so, than those of the executors with respect to such partnership business. If the trustees were authorized by the will to continue the business, they had the implied power to settle the affairs of the partnership at the time appointed for its dissolution, or even before if clearly in the interest of the trust. If, therefore, the sale in this case of the partnership assets to the corporation was made in good faith and was beneficial to the trust estate, it ought not to be disturbed, and having once been effected there could be no difficulty in apportioning the share of the proceeds, and, hence, no necessity for a compromise.

The trustee would clearly be liable to account for such share of the proceeds; and the surviving partners, some of whom were original trustees, having knowledge of the protest of the beneficiaries against the compromise, might be open to a charge of collusion, which, if sustained, would make them also liable. If, however, the \$25,000 paid was a full equivalent of the share of stock and other consideration paid for the partnership assets, there would be no good reason to require an accounting; but the pleadings do not disclose in what particular, if any, the trust estate was injured by the compromise, and until it does so appear the plaintiffs are not entitled to the relief prayed for.

If the motion for judgment on the pleadings is pressed the

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same will be overruled, but if withdrawn and a demurrer to the reply filed, the latter will be sustained.

*Kittredge & Wilby* and *William Worthington*, for the motion.  
*J. J. Glidden* and *John C. Healy*, contra.

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### NEGLIGENCE IN WALKING ON A RAILWAY TRACK.

[Circuit Court of Summit County.]

ERIE RAILROAD CO. ET AL V. KATE MCCORMICK, ADMINISTRATRIX.

Decided, April Term, 1902.

*Negligence—As Between Railway Engineer and Track-Walker—Not Fellow Servants—Speed Ordinance Admissible as Evidence, when—Recovery for Negligence of Engineer Notwithstanding Contributory Negligence of Deceased—Excessive Damages.*

1. In an action against a railway company for wrongful death, an ordinance limiting the speed of trains within the municipal limits is admissible when the negligence charged is that the train which struck the decedent was being run at such a rate of speed as to itself constitute negligence.
2. A track-walker when out upon the road alone is not a fellow servant with the engineer of an approaching train, notwithstanding he may have power to flag trains when necessary.
3. Such a track-walker who goes upon a railway bridge over which trains habitually run at a high rate of speed, knowing there is a train long overdue and without looking for its approach, is guilty of contributory negligence, notwithstanding a municipal ordinance limits the speed of trains at that point to six miles an hour.
4. But where an engineer who sees such track-walker 800 feet distant, makes no proper effort to slacken the speed of the train and the man is struck and killed, the company is liable for his death, notwithstanding his own contributory negligence, provided he could not have escaped after discovering his danger.
5. A verdict of \$5,200 is excessive for wrongful death of a track-walker earning \$1.25 per day. Amount reduced to \$4,000.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

Error to the Court of Common Pleas of Summit County.

The case grew out of this state of facts: On the morning of Christmas day, December 25, 1897, James Thomas McCormick



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was killed by being struck by a train of the Erie Railroad Company, crossing a trestle in the northeasterly part of this city (Akron). Katie McCormick was appointed administratrix of the estate of the deceased Thomas, and brings suit under the statute authorizing such proceeding to be brought for the benefit of those (the next of kin) who have a right. The trial resulted in a verdict and judgment for the plaintiff below, and motion for a new trial was made and overruled, and error is brought here to reverse that judgment. A bill of exceptions is filed here containing all the evidence introduced in the court below.

It is complained on the part of the plaintiff in error that the petition fails to state facts sufficient to constitute a cause of action. Without stopping to read from the petition, we hold that the petition does state sufficient facts to constitute a cause of action against the railroad company. Both companies were sued, the Erie and the Nypano, the Erie being a lessee of the other company.

The petition complains of negligence on the part of the railroad company in that it was running its train, which caused the death of McCormick, at a negligent and improper rate of speed. It complains that there was negligence in not giving proper alarm by the ringing of a bell and the sounding of a whistle. It complains that there was negligence in not checking the speed of or stopping the train after it was known, or ought to have been known, that the decedent was in a place of danger, where, if the train could not be checked or stopped, he would be killed or seriously injured. One of the charges of negligence, then, as has already been stated, is that the train was being run at a rate of speed too high and such as made it negligence to so run the train.

There was offered in evidence, on the part of the plaintiff below, an ordinance of this city, which provides that trains shall not run within the city limits at a greater rate of speed than six miles an hour. Objection was made to the introduction of that, and complaint is made that the court allowed that ordinance to be introduced.

It is urged that on the whole evidence it is perfectly plain that the train habitually ran over that part of the road at about

the rate of speed that it was running on the occasion of the accident. The train, as a matter of fact, was running, at the time of this accident, probably at least at forty miles an hour. It is said that it is perfectly clear that this was the usual rate of speed at that place, and that the decedent knew it to be so. But remembering that one of the charges of negligence is, without reference to what excuse the company had as against the decedent, or any one representing him, the running at a higher rate of speed than prudence would allow, running at such a rate as made it negligence, the question as to whether the ordinance should be introduced must be governed by whether it bears upon that question.

The court allowed the ordinance to be introduced in evidence, and on page 144 of the bill the court explains to the jury just what weight should be given to the evidence, or rather it explains the question upon which the evidence was admissible, and in so charging the jury quoted almost exactly the language of Judge Johnson in the case of *Meek v. Pennsylvania Co.*, 38 Ohio St., 632, and that language is quoted with approval by our Supreme Court in the case of *Davis v. Guarnieri*, 45 Ohio St., 470, 485. There was no error in the admission of that ordinance as evidence. And the court, in its charge, properly instructed the jury as to what issue, and only what, that evidence was to be addressed.

There were a number of requests made by the defendant below for charges to be made to the jury. All of the requests made prior to the giving of the charge were given, except the first two.

The first reads—

“If you find that on the day of this injury to McCormick while he was on duty on the defendant's road as track walker, he had no superior with him, but was alone and sole power, control and direction as to the manner and time of pursuing his duties in his then branch and department of service, and the power of flagging trains when necessity required it, then I say to you for that time, and in the operation of train 5 (which was the train causing the death of McCormick) the engineer of said train was a fellow servant with him, and for the

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negligence of such engineer the plaintiff can not recover in this case, and you should find for the defendants."

That was refused, and properly refused under Section 3365-22, Revised Statutes. Said sub-section reads:

"That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow servant, but superior of such other employe; also that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

These men were not in the same department of service. McCormick had nobody under him; the engineer did have somebody, the fireman, under him. It is clear the court properly refused to give that charge.

The second is:

"If you find that at and before the twenty-fifth day of December, 1897, the day of McCormick's injury, he had knowledge or means of knowing that train 5 on defendant's road had a schedule time between Kent and Akron of thirty-three and one-third miles per hour, and that said train was habitually run over this division, including the bridge in question, at the rate of thirty-three to forty or more miles per hour, then it became McCormick's duties in discharging his duties as track walker to take notice of such speed of said train, and to act and govern himself according to such rate of speed as said train was actually being run, taking such care of the road and of himself, in going upon, or refraining from attempting to pass over said bridge, as such circumstances in relation to such fast rate of speed required, and he would have no right to rely on the rate of speed provided for in the city ordinances admitted in evidence, and in such case I say to you you should disregard the ordinance and the fact that the bridge was within the city limits."

That was refused. The court, in refusing that, said, except for the last clause it would probably be proper to give it. But, as has already been said, as to the admissibility of the ordinance on objection made, the court properly admitted it, and without stopping to read what the court said, the court, in its charge to the jury, did properly instruct them as to the effect of that ordinance, and there was no error in refusing to give the request.

The evidence shows that McCormick was what is called a track walker on the line of the Erie road between Tallmadge and Akron; that he was accustomed to walking over this part of the road daily, perhaps more frequently than once a day; that he was entirely familiar with the manner in which the trains were run; that trains habitually ran without regard to the ordinance of the city over this part of the road at a rate of speed in the neighborhood of forty miles an hour; he also knew—it was his business to know—as shown by the rules, he must keep track of the trains—it was his business on this occasion to know that the train was late; it was, as a matter of fact, two or three minutes more than two hours late; it was his business to know that. Doubtless, he did know it. So that he went on to this bridge, for he was walking from toward Tallmadge to Akron, came to the bridge at the east end of it and was walking across toward the west end, and he either knew or it was his business to know that that train was liable to come at any time. The evidence shows that he was muffled up—his ears were probably muffled; it was a cold morning, as already said, in December; the evidence makes it probable, though not certain, that the bell rang and the whistle was sounded at the Tallmadge road, something like a thousand feet east of this bridge before it reached that road, perhaps 1,500 feet before it reached the road that the whistle blew. This man may not have heard it. It is possible that it did not blow, but the probabilities are very strong that it did, and it seems certain that the man who knew that that train was behind time, whose business it was to know it, and did know it was liable to come at any time, going on to that bridge without unmuffling his ears and trying to ascer-

tain in some way whether that train was coming, was guilty of negligence. We think that the evidence is clear that McCormick was negligent at the time that he went onto that bridge, so that if he is entitled to recover it is in spite of that proposition of law that he who contributes by his own negligence to an injury is not entitled to recover for such injury.

What was known about it by the engineer running that train, and did he do that which he ought to have done after he knew, or, if he had exercised reasonable care, ought to have known that this man was in this place of danger? He says that something like six or eight hundred feet, six hundred feet, at any rate, before the place where the man was struck, he saw him; indeed, it must have been further than that, well up toward the Tallmadge road, he saw McCormick; he says that he didn't know whether he was on the bridge or not. First, he says he was not, but later on he says he did not know whether he was on the bridge or not. He says that he saw him; he saw him with such distinctiveness that he saw there was a wrench over his shoulder; it was not snowing; he says it had been snowing, but it was not then snowing; he saw this man on the bridge; he must have been on the bridge or on the approach at the west end; he was killed at a point further west than the west abutment of the bridge; he was killed within twelve or fifteen feet of the west end of the approach. He says that he did not thereafter see him, and mentions snow as one of the reasons, but later on he says it was not snowing. The fireman says by reason of there being snow on the ground it flew up around the engine, but the engineer says the wind was blowing from the west, and that the smoke trailed down over the train so that he did not see him when they came round the curve. Possibly he meant to say, although he does not distinctly say so, that the front end of the engine would come within the line of vision between him sitting on the right hand of the engine and McCormick; but he says the smoke trailed down over the engine and over where he was so as to interfere with his seeing. He says, however, that he sounded the whistle, put on the brake. He does not, in his direct testimony, say

that he put on an emergency brake, but he does say later on in his testimony that he did all in his power to stop the train. The fireman says nothing about that, and he nowhere says that there was any checking in the speed of the train at all. If the engineer did not understand that McCormick was in a place of danger when he saw him it is a little difficult to understand why he thought it was necessary to do all in his power to stop that train or check it. The two young men, who were skating nearby, who saw the train, testify about this accident. One of them, and only one of them, says that there was no checking of the speed of the train. The other, on cross-examination, was asked if he could tell within fifty feet when he saw it whether it was so checked. He said he thought he could, but he didn't say anything about whether the speed of the train was checked, but the other man, whose name I don't recall, says there was no checking at all. It has already been said the fireman does not say there was, and nobody says there was except the engineer. The result was that the train was not sufficiently checked, at least, to save this man. The evidence shows, and especially by one witness, who was formerly a conductor and perfectly familiar with that line, that at that place and at that time the speed of the train could have been very materially reduced in the distance between the place where the engineer saw the deceased and the place where the engine struck him.

The court instructed the jury properly, that if McCormick was in fault, if he was negligent, no recovery could be had here, unless the engineer could have saved McCormick by exercising that prudence which, under the circumstances, it was his duty to exercise; that prudence which an ordinary prudent man would exercise under similar circumstances. The court charged the jury properly on that.

The jury must have found, for we think it is certain the jury found McCormick was negligent, that the engineer is mistaken when he says he put on all the appliances he could to check the speed. If he did not think the man was in danger there would be no reason why he should put on all the appliances. We think he did see that the man was in danger,

but he reasoned with himself he probably would get out of the way, and he did not exercise the prudence that he ought; at least, that it is not clear that the jury was wrong in finding that.

Without commenting upon the other errors complained of, although each one of them has been carefully considered, we find no error (a majority of the court only hold as the opinion is being announced) except in the question of the measure of damages.

Of course, it is difficult to fix a proper amount of damages, but the damages awarded here are such that the interest on the amount of money awarded here as damages would practically amount to as much as this man was earning. The damages were \$5,200. He was earning only \$1.25 a day; and we think the jury must have intended to give such an amount that the interest on it would have amounted to his wages, or practically his wages, overlooking the fact that if he kept on earning wages to the end of his life, the whole amount would then be gone, whereas, if he put out the money he would still have the capital left, and overlooking the true measure of damages, that it should be a compensation for the pecuniary loss. It is said by some authorities—it is said in *Hill on Damages*, and some cases are cited in support of the proposition that we take into account, of course, nothing for solace, nothing for wounded feelings, but the care the parent might exercise for the benefit of his children, may be considered, but taking that into account, and being most liberal, we think the jury awarded damages greater than should have been awarded. In a case where a man was earning \$1.25 a day, there could not have been such a pecuniary loss as would have required \$5,200 to compensate, and unless the plaintiff below is prepared to remit \$1,200 from this amount, and accept \$4,000, the case will be reversed. Otherwise it will be affirmed.

*Tibbals & Frank*, for plaintiff in error.

*E. F. Voris* and *A. J. Wilhelm*, for defendant in error.

**LOCATION OF PESTHOUSES.**

[Circuit Court of Lorain County.]

CITY OF LORAIN ET AL V. JOSEPHINE ROLLING ET AL.

Decided, October 12, 1902.

*Pesthouses—Location of Outside of Municipal Territority—Consent by Township Authorities not Necessary—Sections 2142 and 2169.*

The location of a pesthouse does not create a nuisance *per se*, and the site may be selected outside the corporate limits, without first obtaining the consent of the authorities of the township.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

Heard on error.

The city of Lorain bought outside the city limits twelve acres of land and was about to erect on it a structure called a pesthouse, when this action was brought to restrain the erection thereof on this piece of land by the defendants in error, Josephine Rolling and others, who have property adjoining, or at least across the road from the property in question.

In the trial of the case it was contended that before grounds could be obtained for a pesthouse outside of the limits of the corporation establishing the pesthouse, that permission must be had from the trustees of the township where it was to be established, if outside of the corporation establishing it, and that this consent was not obtained, and, that being true, the city of Lorain was proceeding unlawfully, and that it was proper and right to restrain its unlawful action.

On the other side, the city of Lorain contended in establishing a pesthouse that it was not acting under the law for establishing a place for sanitary plants; but the two were entirely separate and distinct, and in procuring the grounds and establishing a pesthouse the consent of the municipality or public authorities where it was established, if outside of the city or village, was entirely unnecessary, and, hence, the law pertaining to sanitary plants did not apply. The court below held the law pertaining to sanitary plants did apply.



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Now the plaintiffs below, in presenting their case, made this legal point that I have spoken of, as to which law applies, and then offered no evidence as to whether or not this was a nuisance. They undertook to offer some evidence that it would reduce the value of property in that neighborhood, but the only witness called was unable to say, hence no evidence was obtained upon that point.

Then the defendant proceeded to show that establishing this pesthouse would not render that neighborhood unhealthy or liable to contract contagious diseases from parties who were placed in the pesthouse, and the testimony, so far as the defendant below was concerned, was quite conclusive upon that point. But the court below rendered judgment against the city of Lorain and in favor of the plaintiffs below, and the city of Lorain files the petition in error to reverse that judgment in this court.

There is only one question we are concerned with, and yet we may discuss two, as it will lead to the right conclusion, we think, in this case.

What statute applies? It is contended that Section 1692, Revised Statutes, subdivision 23 or paragraph 23, giving general powers to municipalities, bestows upon Lorain the authority to establish a pesthouse, and it does in direct terms give that authority. Then Section 2169, Revised Statutes, states where and how that pesthouse may be established, and that puts no restrictions upon the village, so far as obtaining the consent of other municipalities or other authorities if the pesthouse is built outside of the city, and that has been the law for a long time. Then Section 2142, Revised Statutes, with which the court below held that the city must comply in obtaining the consent of the authorities where the grounds were established outside the city, the court held to apply in this case. Section 2169, Revised Statutes, applies to pesthouses; there is no question about that. The court below held that Section 2142, Revised Statutes, also applied. Section 2142, Revised Statutes, is found in 94 O. L., 342, and also again on page 383; but there is no difference in the two; they both amend Section 2142, Re-

vised Statutes. There is no difference so far in the sections we desire to consider; they are precisely the same. Section 2142, Revised Statutes, pertains to quarantine grounds controlled by the city.

“Any city, village, hamlet or township may establish a quarantine ground or grounds within or without its own limits, but if such place be without its limits, the consent of the municipality or township within which it is proposed to establish it shall be first obtained; and the board of health within the city, village, hamlet or township having quarantine grounds or dump grounds, shall have exclusive control of the same.”

If this pertains to quarantine grounds, then it is clear that the consent of the township where it is established must be obtained—obtained perhaps through the trustees, but it does not state exactly how; but the trustees are the representatives of the township and might give consent; the law probably implies that. But that is not necessary to the consideration of this case, but after consent is thus obtained and the grounds are established, then the corporation establishing them has control.

The title to the act as found in the session laws is, “To amend Section 2142, Revised Statutes of Ohio, providing for the control of quarantine grounds and relating to the power of boards of health, enabling municipalities to erect and maintain sanitary plants.” That is, the purpose of the act is, to enable a corporation or municipality to acquire quarantine grounds first, and then in addition to that to erect thereon a sanitary plant.

The object of a sanitary plant is clearly defined in the act, as is found in the act itself, and also in the general statutes. Section 2142a, Revised Statutes, definition of sanitary plant: “The expression ‘sanitary plant,’ as herein used, shall be held to mean a structure with the necessary land and all the necessary fixtures and appliances and appurtenances required for the treatment and purification and disposal, in a sanitary manner, of either or both the liquid or solid wastes of the municipality.” So the act provides for obtaining quarantine grounds and for building a sanitary plant thereon, and then the grounds and the structure together are to be known as the sanitary plant.

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Well, after obtaining the ground, the act provides that buildings may be erected, and machinery, appliances and appurtenances acquired, necessary for the disposal, in a sanitary and economic manner, of the sewage and garbage, night soil, dead animals, offal, spoiled meats and fish or any putrid substance, or any liquid or solid wastes, or any substances injurious to health of the municipality. This, then, seems to be a plant simply for taking everything that is full of microbes and deadly poisons and injurious to health, and by some sort of machinery purifying it and making it healthy. That is all it is—destroying the poisonous gases and poisoned substances in these refuse matters of all kinds. It has nothing to do whatever with a pesthouse, and the court erred in holding that this assent must be obtained of the township where it was built.

Now certain evidence was taken, and as this case will have to be remanded, perhaps it is well enough to discuss it very briefly. This pesthouse is erected by authority of law, and certain restrictions and provisions are made in regard to the manner of establishing, erecting and using it. Therefore, the mere erecting of a pesthouse can not be an unlawful thing. The mere erecting not being unlawful, it can not be a nuisance *per se*.

But if a method is pursued that will necessarily make it dangerous beyond that already contemplated by the law, then it may be a nuisance, and before actual using might be condemned by the authorities and they be enjoined from establishing it. But if the mode prescribed and manner contemplated has been pursued, or if no mode or manner is definitely pointed out by the law, if that generally approved is pursued, then there can be no injunction and no declaring it a nuisance until it is wrongfully used. If it is so negligently used, so carelessly used and so used contrary to the intent of the law, it may become a nuisance, and it may be then enjoined. And that is the whole law of the case as I understand it. Of course, I am not committing the court on what I say now, and the case must be reversed and remanded for a new trial.

*E. G. Johnson and W. L. Hughes, for plaintiffs in error.*

*Metcalf & Cinniger, for defendants in error.*

**PROCEEDINGS IN AID OF EXECUTION.**

[Circuit Court of Franklin County.]

KOUNS V. REINIGER.

Decided, January Term, 1902.

*Rights of Debtor—In Proceedings in Aid of Execution—What Credits Are Reached by Such Proceedings—Section 6080-2.*

1. In a proceeding in aid of execution brought under Section 6080-2 *et seq.* before a justice of the peace, reaches only debts subsisting at the time of the service of process upon the debtor of the judgment debtor, and does not extend to debts which ripen during the interval between the service of the process and the hearing.
2. The taking of the money of a debtor without authority of law can not be made legal by applying the fund to the payment of his debts.

SUMMERS, J.; WILSON, J., and SULLIVAN, J., concur.

Heard on error.

The question raised is whether under the act "To provide for proceedings in aid of execution before justices of the peace," passed April 27, 1896 (92 O. L., 375; Section 6680-2, Revised Statutes, *et seq.*), money not owing to the judgment debtor at the time of the service of the order, but owing to him at the time the order to pay is made, may be ordered paid to the judgment creditor.

The defendant in error recovered a judgment against the plaintiff in error before a justice of the peace, and subsequently instituted before him proceedings in aid of execution. The person named in the affidavit was ordered to appear by an order that was served on him on February 27. At the hearing on March 8 it appeared that the judgment debtor was employed by the person named in the order by the year at a salary of \$750, payable in bi-monthly installments of \$31.25 each on the fifteenth and thirtieth of each month and on the fifteenth and twenty-eighth when the twenty-eighth was the last working day of the month, and that the judgment debtor had been paid in full to February 15, and that the installment for the last half of that month would have been paid to him on February 28,

and that it was not exempt from execution or attachment. The justice ordered the installment paid to the judgment creditor. The judgment debtor prosecuted error to the court of common pleas, where the order was affirmed, and error is now prosecuted to this court.

It is well settled that the judgment debtor's right to recover the installment payable February 28 was conditioned upon his remaining until that time in the service of his employer. *Larkin v. Buck*, 11 Ohio St., 561; Mechem on Agency, Section 635.

The question then recurs whether proceedings in aid of execution reach only debts subsisting at the time of the service of process upon the debtor of the judgment debtor or extend to such as may be in existence at the time of the hearing.

Section 1 of the act, 92 O. L., 375, provides that when a judgment creditor makes oath that any person "is liable to the judgment debtor in any sum of money, whether then due or not," the justice shall order such person to appear. Section 2 provides that the exact time of service shall be stated in the return, and that the person served, "from the time of the service thereof shall be liable to the judgment creditor for whatever he was *then* liable for to the judgment debtor." Section 3 provides that when the person appear he shall be examined "touching the money for which he is liable as aforesaid."

It is apparent from these sections that the examination is limited to the liability subsisting at the time of the service. The exact time of the service is to be stated and the person served shall be liable for whatever he was then liable for. The words in Section 1, "whether then due or not," relate to the time of payment, and indicate that the word "liable" was not used in its broadest sense and so as to include a contingent obligation, for in that event they would have been unnecessary. The words of the statute are, "liable to the judgment debtor in any sum of money, whether then due or not." Liable is used in the sense of indebted.

A sum payable in any event, though not yet due, is a debt—*debitum in presenti, solvendum in futuro*, but a sum payable on a contingency is not a debt, and does not become such until

the contingency has happened. *People v. Arguello*, 37 Cal., 524.

In *United States v. Bank*, 31 U. S. (6 Pet.), 29, 36, Mr. Justice Story says the word "due" is used in different senses:

"It is sometimes used to express the mere state of indebtedment, and then is equivalent to owed, or owing; and it is sometimes used to express the fact that the debt has become payable. Thus, in the latter sense, a bill or note is often said to be due when the time for payment of it has arrived. In the former sense, a debt is often said to be due from a person when he is the party owing it, or primarily bound to pay, whether the time of payment has or has not arrived." See also *Scudder v. Corryell*, 10 N. J. L., 340, 345.

The word "due" is used in the statute in the sense of payable. This interpretation of the act is in accord with the decisions where similar provisions have been under consideration.

In *Thomas v. Gibbons*, 15 N. W. Rep., 593 (61 Ia., 50), the wages of a brakeman were garnisheed; the answer showed that there was due him at the time of the garnishment \$9.70, and that the garnishee owed him no other debt at that time due or to become due, but that he continued in the employ of the garnishee and earned other wages after the garnishment, to the amount of \$144. The court rendered judgment for only \$9.70, and the plaintiff appealed.

Adams, J., says:

"The question presented arises upon the construction of Section 2975 of the code. The garnishee is required to pay any debt due or thereafter to become due. As to the meaning of the words 'debt due,' there can be no doubt. The question is as to the meaning of the words, 'debt thereafter to become due.' The plaintiff contends that the word 'debt' as used is not restricted to a debt then existing, but may also mean any debt which may thereafter originate. But a debt which has yet to originate can not properly, we think, be said to be a debt which is to become due. Of such a debt nothing can properly be predicated. The words 'to become due' are set out against the word 'due,' and like it are used to describe the word 'debt,' which must mean a subsisting debt." The judgment was affirmed.

Section 3719, Revised Statutes, of Wisconsin is very similar to the statute under consideration. It reads:

“The garnishee from the time of service of summons shall stand liable to the plaintiff to the amount of the personal property, money, credits and effects in his hands belonging to the defendant, and the amount of his own indebtedness to the defendant then due, or to become due, and not by law exempt from executions.”

In *Foster v. Singer*, 69 Wis., 392, where this section was considered, it is held that “A specified salary per month, to be paid to an employe at the end of each month, is not liable to process of garnishment served before the end of the month in which it is to be earned. It is neither ‘then due’ nor is it, within the meaning of Section 3719, Revised Statutes, ‘to become due,’ because its becoming due depends upon a contingency.”

See also *Edwards v. Roepke*, 43 N. W. Rep., 554 (74 Wis., 575); *Hadley v. Peabody*, 79 Mass. (13 Gray), 200; *Phelps v. Railway Co.*, 28 Kan., 165.

In *Newark v. Funk*, 15 Ohio St., 462, 464, where a provision of the code, that “any claims or choses in action due or to become due” might be subjected, was under consideration, Welch, J., says:

“We do not say or suppose that a salary which is not yet earned, or for the payment of which the proper period has not yet arrived, can be so garnisheed or attached. \* \* \* The rule might, perhaps, safely be laid down, that whenever the debtor himself has a right of action, or a present claim which lapse of time *alone* will ripen into a cause of action, his creditor may, in the cases specified in the statute, be substituted to his rights by garnishment.”

The policy of a law that would authorize the subjecting of unearned wages to the payment of debts well might be doubted. Its enforcement would tempt even an honest man to repudiate his debts. In *Phelps v. Railway Co.*, *supra*, p. 172, Brewer, J., says:

“We may also remark here without enlarging to any extent, that the construction claimed by the plaintiffs would tend to prevent dealings of any kind between the debtor and other parties. By serving a few garnishee notices the future earnings

of a debtor might be wholly seized for the payment of his debts, leaving him nothing for personal support. In that way a laborer, however skillful and however valuable his services, might practically be driven from a community."

It is said in the argument that the court of common pleas entertained a similar view of the statute, but affirmed the order because the plaintiff in error was not prejudiced. We think he was prejudiced \$31.25 worth. He was served with notice of the hearing, as provided by the act, and is, we think, bound by the order made against his debtor, and in this view he is wrongfully deprived of his money and it was in prejudice of his rights, for in law it is his money and prejudice to his legal rights by taking his money without authority of law, and is not cured by applying the money to the payment of his debt.

The judgment of the court of common pleas is reversed and the order of the justice of the peace set aside at the costs of the defendant in error.

*E. L. Pease*, for plaintiff in error.

*Charles F. Prior*, for defendant in error.

### CONSTRUCTION OF WILLS.

[Circuit Court of Hamilton County.]

JOHN H. MCCORMICK, ADMR., ETC., v. GEORGE DUNKER ET AL.\*

Decided, January 12, 1903.

*Wills—Words "Next of Kin" Construed—Bequests to Charitable Institutions not Accurately Named in Will.*

1. In construing a will the words "next of kin" will be taken in their technical sense unless from the context it clearly appears that a different meaning is intended.
2. If bequests are made to charitable institutions under defective appellations which are not generic, ambiguity may be removed by extrinsic evidence.

JELKE, J.; SWING, J., and GIFFEN, J., concur.

Technical words in a will must be taken in their technical sense unless the contrary clearly appears from the context.

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\*Affirmed by the Supreme Court, without report, May 10, 1904.



1904.]

Hamilton County.

We are of opinion that it clearly appears from the will of Henry Duncan (Dunker), deceased, that his widow's second husband, McCormick, was not included, meant or intended within the term "next of kin" as used in said will, notwithstanding that term's legal or statutory signification.

Construing the provision for the German Protestant Orphan Asylum in view of decedent's nativity, residence and associations, and in view of the general and colloquial appellation given to a particular institution in this city, we find no difficulty in finding that testator had in mind and intended to designate the German General Protestant Orphan Asylum now situated on Mt. Auburn, in Cincinnati.

The difference between the case at bar and the cases cited by counsel resisting this interpretation, is that in all these latter cases the name has been a generic one, as "the Sisters of Charity," in *Moran v. Moran*, 73 N. W. Rep., 617 (104 Ia., 216); while in the case at bar there has been a manifest effort to nominate a particular institution, but ambiguity has arisen from an inaccurate or defective appellation. This uncertainty can be removed by extrinsic evidence.

The law is well stated in Paige on Wills, Section 539, p. 622, where the text is well supported by citations to cases adjudicated by high authority:

"Misnomer is especially frequent in devises to charitable corporations. The real names of such corporations are often never used and never known by people generally; and many testators do not feel the need, in preparing a will, of getting the real name of the proposed beneficiary. They prefer to guess at the name. Hence the number of adjudicated cases upon this point.

"It is an elementary principle that where a corporation is indicated in a will by an erroneous name, such a mistake will not avoid the gift if it is possible by means of the name used, or by extrinsic evidence, to identify the corporation intended as beneficiary with sufficient certainty."

Also see *Woman's Union Missionary Soc. v. Meade*, 131 Ill., 33 (23 N. E. Rep., 603.)

"A mistake in the name or description of the legatee or devisee, whether an individual or corporation, will never render a bequest void, if the name and description used in the will, as applied to the facts and circumstances proved, will identify such person or corporation."

When we come to the provision of the will for the "Catholic Orphan Asylum" we are not so certain. There is one more element of ambiguity as to this bequest, because at the time of the making of the will there were two institutions in Cincinnati which might answer this appellation. But, taking the will as a whole, and remembering the facts and circumstances of the testator, and noting that German orphans were peculiarly the objects of his bounty, and that the word "Catholic" was used as complementary to the word "Protestant," we come to the conclusion that the particular institution intended was the German Catholic Orphan Asylum; that is, the institution whose corporate name is and was "the St. Aloysius Orphan Asylum."

Decree accordingly.

*Cohen & Mack*, for John H. McCormick.

*W. W. Bellew* and *Herman Merrell*, for next of kin of Catherine McCormick.

*Chris Von Seggern*, for German General Protestant Orphan Asylum.

*Arnold Speiser*, for St. Aloysius Orphan Asylum.

*W. W. Bellew*, for the Dunker heirs.

**DEBTS OF RELIGIOUS SOCIETIES.**

[Circuit Court of Hamilton County.]

**HORACE W. MALES v. JEREMIAH MURRAY ET AL.**

Decided, March 15, 1902.

*Unincorporated Religious Congregations—Finding of Court as to an Indebtedness of—Not a Judgment, but a Debt of Record—Who Constitute the Real Debtors.*

1. The finding of a court that a certain amount is due from an unincorporated church is not a judgment, but constitutes a debt of record.
2. The real debtors in such a case are the members of the church at the time the debt was contracted, who can be shown to have in some way sanctioned or acquiesced in its creation.

The plaintiffs are assignees of a finding of court that the assignors were the owners of a valid claim against the unincorporated Catholic congregation known as the Church of the Atonement. Subsequent to the sale of the property upon which this claim was a lien, the present plaintiffs came into court with petitions alleging that the defendants, the pastor and trustees of the Church of the Atonement, had accumulated a fresh fund of \$8,000, and asking that they be required to pay these assigned claims out of it. At the hearing below Judge Hollister dismissed these petitions, 7 N. P., 614, which see for a full statement of the facts.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The claim sued on in each case is not a judgment, but a finding of the amount due to the plaintiff from the congregation of the Church of the Atonement, constituting a debt of record. It is not a debt of the congregation or of the church as a legal entity, distinct from the members composing it, but it is a debt of those members only who were such at the time the pastor executed and delivered the note upon behalf of the congregation and upon which the finding of the court was based.

All the property at that time controlled by or held in trust for the use of the congregation was sold and the proceeds or-

dered to be applied to the payment of a mortgage lien, and the balance, if any, to the payment of plaintiff's claim and others.

The fund now sought to be subjected to the payment of plaintiff's claim was accumulated subsequent to the sale of the premises involved in case No. 1490, from pew rents and other sources, and by a congregation not composed of the same members as when the debt was contracted.

It is true, as suggested by counsel for plaintiff, that for certain purposes a church congregation remains, in legal contemplation, the same body, although its membership has changed, and our Supreme Court has so held in *Mannix v. Purcell*, 46 Ohio St., 102; but it did not say or intend to say that such congregation could sue or be sued, contract and be liable the same as a person, natural or artificial. The Church of the Atonement was not such a legal entity as could be sued in that name, although its membership had remained the same; and in order to hold a member responsible for its debts it must be shown that such member, in some way sanctioned or acquiesced in their creation. *Devoss v. Gray*, 22 Ohio St., 159.

There is no attempt in these suits to make the congregation or any of its members party defendant, and hence the real debtors are not before the court, and if they were, the want of a judgment would be a good defense. *Clark v. Strong*, 16 Ohio St., 317, 318.

Petitions dismissed; the application to make new parties denied.

*D. S. Oliver and George J. Murray*, for the petitioners.

*J. Ledyard Lincoln*, contra.

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